No. 17-5716	
Title:	**Timothy D. Koons, Kenneth Jay Putensen, Randy Feauto, Esequiel Gutierrez, and Jose Manuel Gardea, Petitioners** **v.** **United States**
Docketed:	August 24, 2017
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Numbers:	(15-3794, 15-3825, 15-3854, 15-3800, 15-3894)
Decision Date:	March 10, 2017
Rehearing Denied:	May 25, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 22 2017	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 25, 2017)
Sep 21 2017	Order extending time to file response to petition to and including October 25, 2017.
Oct 25 2017	Brief of respondent United States in opposition filed.
Nov 09 2017	DISTRIBUTED for Conference of 12/1/2017.
Dec 04 2017	DISTRIBUTED for Conference of 12/8/2017.
Dec 08 2017	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Dec 18 2017	Motion to appoint counsel filed by petitioners Timothy D. Koons, et al. **Main Document** **Proof of Service**
Dec 27 2017	DISTRIBUTED for Conference of 1/12/2018.
Jan 16 2018	Motion to appoint counsel filed by petitioners GRANTED, and Jeffrey L. Fisher, Esquire, of Stanford, California, is appointed to serve as counsel for the petitioners in this case.

Jan 17 2018	Blanket Consent filed by Petitioner, Timothy D. Koons, et al. **Blanket Consent**
Jan 22 2018	Brief of petitioners Timothy D. Koons, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 22 2018	Joint appendix filed. (Statement of cost filed.) **Main Document** **Proof of Service**
Jan 22 2018	Motion for leave to file a supplemental volume of the joint appendix under seal filed by petitioner Timothy D. Koons, et al. **Main Document** **Proof of Service** **Other**
Jan 24 2018	SET FOR ARGUMENT ON Tuesday, March 27, 2018
Jan 29 2018	Brief amicus curiae of Families Against Mandatory Minimums filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amicus curiae of National Association of Federal Defenders filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 31 2018	DISTRIBUTED for Conference of 2/16/2018.
Feb 07 2018	CIRCULATED
Feb 20 2018	Motion for leave to file a supplemental volume of the joint appendix under seal GRANTED.
Feb 21 2018	Record requested from the U.S.C.A. 8th Circuit.
Feb 21 2018	Brief of respondent United States filed. (Distributed) **Main Document** **Certificate of Word Count**
Mar 13 2018	Reply of petitioners Timothy D. Koons, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

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RECORD
AND
BRIEFS

NO. 17-5716

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2016

Timothy D. Koons,
Kenneth Jay Putensen,
Randy Feauto,
Esequiel Gutierrez, and
Jose Manuel Gardea. - PETITIONERS,

vs.

United States of America, - RESPONDENT.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Eighth Circuit Court of Appeals erred in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory guideline sentencing range was below a statutory mandatory minimum and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence under 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline Amendment 782, which lowered the base offense levels assigned to most drug quantities?

(2) Whether *Freeman v. United States*, 564 U.S. 522 (2011) (plurality opinion) supports the holding that there is a substantive limitation on the term "based on" in 18 U.S.C. § 3582(c)(2) that prohibits defendants whose initial advisory guideline range was below a statutory mandatory minimum, and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), from being eligible for further reduction in sentence due to retroactive sentencing guideline Amendment 782?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

STATUTORY AND SENTENCY POLICY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 20

APPENDIX 21

INDEX TO APPENDICES

APPENDIX A: Decision of the Eighth Circuit Court of Appeals March 10, 2017 22

APPENDIX B: Eighth Circuit Court of Appeals Order Denying Petition for Rehearing or Rehearing En Banc May 25, 2017 34

TABLE OF AUTHORITIES

Federal Cases

Dillon v. United States, 560 U.S. 817 (2010) 10, 15
Freeman v. United States, 564 U.S. 522, 526 (2011) 15, 17, 18, 19, 20
In re Sealed Case, 722 F.3d 361, 368 (D.C. Cir. 2013) 13, 14, 15
United States v. Anderson, 686 F.3d 585 (8th Cir. 2012) 10
United States v. C.D., 848 F.3d 1286 (10th Cir. 2017) 8
United States v. Jones, 523 F.3d 881 (8th Cir. 2008) 11
United States v. Koons, 850 F.3d 973 (8th Cir. 2017) 17
United States v. Logan, 710 F.3d 856 (8th Cir. 2013) 18
United States v. Savani, 733 F.3d 56 (3d Cir. 2013) 13-14
United States v. Williams, 808 F.3d 253 (4th Cir. 2015) 8, 9, 12, 13, 16, 17

Federal Statutes

18 U.S.C. § 922(g)(1) (2012) 4
18 U.S.C. § 924(a)(2) (2012) 4
18 U.S.C. § 3553(e) (2012) 2, 5, 6, 7, 9, 12, 13, 14, 16, 17, 19
18 U.S.C. § 3582(c)(2) (2012) 2, 4, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19
21 U.S.C. § 841(a)(1) (2012) 4, 5, 6
21 U.S.C. § 841(b)(1)(A) (2012) 4, 5, 6
21 U.S.C. § 841(b)(1)(B) (2012) 5
21 U.S.C. § 841(c)(1) (2012) 6
21 U.S.C. § 841(c)(2) (2012) 6
21 U.S.C. § 846 (2012) 5, 6
21 U.S.C. § 851 (2012) 4, 5, 6, 11
28 U.S.C. § 994(n) (2012) 3, 15
28 U.S.C. § 994(o) (2012) 3, 9, 10, 15
28 U.S.C. § 994(u) (2012) 3, 13, 15

United States Sentencing Guidelines and Policy Statements

USSG §1B1.10(c) (Policy Statement) (2016) 3, 4, 5, 7, 10, 12, 13, 14, 15
USSG §5G1.1 (2016) 6, 11, 12, 13, 14, 16, 19
USSG §5G1.2 (2016) 5, 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2016

No. _____

Timothy D. Koons,
Kenneth Jay Putensen,
Randy Feauto,
Esequiel Gutierrez, and
Jose Manuel Gardea - PETITIONERS,

vs.

United States of America, - RESPONDENT.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Timothy D. Koons, Kenneth Jay Putensen, Randy Feauto, Esequiel Gutierrez, and Jose Manuel Gardea, through counsel, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in consolidated case Nos. 15-3794, 15-3825, 15-3854, 15-3880, and 15-3894, entered on March 10, 2017. Defendants' petition for rehearing en banc and petition for rehearing by the panel were denied on May 25, 2017.

OPINION BELOW

On March 10, 2017, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is published and available at 850 F.3d 973.

JURISDICTION

The Court of Appeals entered its judgment on March 10, 2017, and denied Defendants' petition for rehearing en banc and petition for rehearing by the panel on May 25, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING POLICY STATEMENTS INVOLVED

18 U.S.C. § 3553 (2012):

> **(e) Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3582(c) (2012):

> The court may not modify a term of imprisonment once it has been imposed except that —
>
> * * *
>
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment,

after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.

28 U.S.C. § 994 (2012):

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

USSG §1B1.10 (Policy Statement) (2016):

(c) CASES INVOLVING MANDATORY MINIMUM SENTENCES AND SUBSTANTIAL ASSISTANCE.– If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance

to authorities, then for the purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

STATEMENT OF THE CASE

This is a consolidated direct appeal by defendants, Randy Feauto (hereinafter Feauto), Jose M. Gardea (hereinafter Gardea), Esequiel Gutierrez (hereinafter Gutierrez), Timothy D. Koons (hereinafter Koons), and Kenneth Jay Putensen (hereinafter Putensen), following the district court's denial of their sentence reductions pursuant to 18 U.S.C. § 3582(c)(2), implementing retroactive guideline amendment 782 to the United States Sentencing Guidelines pursuant to policy statement USSG § 1B1.10(c). The United States District Court had original jurisdiction over the appellants' federal criminal prosecutions.

On June 25, 2013, defendant Feauto was sentenced to 132 months of imprisonment, having pled guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851; and to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (*Feauto* DCD 42, 55).[1] At sentencing, the district court found a total offense level of 33, at criminal history category III, for an advisory sentencing range of 168 to 210 months of

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[1] In this brief, the following abbreviation will be used:
"DCD" -- district court clerk's record, preceded by defendant's name and followed by docket entry and page number, where noted.

imprisonment, which was elevated to 240 months pursuant to USSG §§ 5G1.1(b), 1.2(b). (*Feauto* DCD 55). The sentence of 132 months of imprisonment was arrived at after the grant of a 45% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Feauto* DCD 56, 57).

On July 17, 2014, defendant Gardea was sentenced to 84 months of imprisonment, having pled guilty to conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, and 851. (*Gardea* DCD 25, 36). At sentencing, the district court found a total offense level of 23, at criminal history category IV, for an advisory sentencing range of 70 to 87 months of imprisonment, which was elevated to 120 months pursuant to USSG § 5G1.2(b). (*Gardea* DCD 36). The sentence of 84 months of imprisonment was arrived at after the grant of a 30% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Gardea* DCD 37, 38).

On July 31, 2014, defendant Gutierrez was sentenced to 192 months of imprisonment, having pled guilty to conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine, which contained 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851. (*Gutierrez* DCD 23, 24, 26). At sentencing, the district court found a total offense level of 31, at criminal history category VI, for an advisory sentencing range of 188 to 235 months of imprisonment, which was elevated to 240 months pursuant to USSG § 5G1.2(b). (*Gutierrez* DCD 37). The sentence of 192 months of imprisonment was arrived at

after the grant of a 36% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Gutierrez* DCD 36, 37).

On October 15, 2010, defendant Koons was sentenced to 180 months of imprisonment, having pleaded guilty to conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851. (*Koons* DCD 24, 55). At sentencing, the district court found a total offense level of 31, at criminal history category IV, for an advisory sentencing range of 151 to 188 months of imprisonment, which was elevated to 240 months pursuant to USSG § 5G1.1(b). (*Koons* DCD 55). The sentence of 180 months of imprisonment was arrived at after the grant of a 25% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Koons* DCD 56, 57).

On September 25, 2008, defendant Putensen was sentenced to 264 months of imprisonment, having pled guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine, to distribute and possess pseudoephedrine, and to possess pseudoephedrine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(c)(1), 841(c)(2), 846, and 851. (*Putensen* DCD 14, 21). At sentencing, the district court found a total offense level of 34, at criminal history category III, for an advisory sentencing range of 188 to 235 months of imprisonment, which was elevated to mandatory life imprisonment pursuant to USSG § 5G1.1(b). (*Putensen* DCD 21). The sentence of 264 months of imprisonment was arrived at after the grant of a 35% reduction, utilizing 406 months as a life

term, pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Putensen* DCD 22, 27.1). Subsequently, while this matter has been on appeal, on January 17, 2017, Putensen's sentence was commutted to 188 months of imprisonment, conditioned upon enrollment in residential drug treatment, and he remains incarcerated at this time. (*Putensen* DCD 46).

Consideration of defendant Feauto's eligibility for a sentence reduction pursuant to retroactive guideline amendment 782 began in March 2015. An initial hearing was held on July 17, 2015, at which the district court ordered further briefing on the issue of the proper method for applying retroactive amendment 782 where a mandatory minimum and a substantial assistance departure were involved in the original sentencing. (*Feauto* DCD 69, 70). Notice was also provided to the Federal Public Defender, so the Defender could file an amicus curiae brief on the issue. A second hearing was held on October 23, 2015, at which the district court considered briefs filed by the government (*Feauto* DCD 73), defendant Feauto (*Feauto* DCD 81), and amicus counsel (*Feauto* DCD 74). Following the hearing, a tentative opinion was provided to the parties, along with amicus counsel, the Federal Public Defender. The government and amicus counsel submitted comments on November 11, 2015 (*Feauto* DCD 87, 89), and defendant Feauto submitted comments on November 12, 2015. (*Feauto* DCD 91). On November 23, 2015, the district court found that the Sentencing Commission acted outside of its authority in the manner in which it crafted and directed implementation of USSG § 1B1.10(c), and that Congress thereby violated the non-delegation doctrine and the separation

of powers principle. (*Feauto* DCD 92). Based on this finding, on November 24, 2015, the district court entered orders denying sentence reductions for defendants Gardea, Gutierrez, Koons, and Putensen. (*Gardea* DCD 48; *Gutierrez* DCD 46; *Koons* DCD 100; *Putensen* DCD 38).

Defendants challenged the denial of their sentence reductions on appeal, and the cases were consolidated by the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals affirmed the district court's denial of their eligibility for a sentence reduction, but on alternative grounds. In doing so, the Eighth Circuit analyzed the issue in accordance with that of the Tenth Circuit Court of Appeals in *United States v. C.D.*, 848 F.3d 1286 (10th Cir. 2017), and ruled that such defendants are not eligible for a reduction under 18 U.S.C. § 3582(c) because their sentences were originally based on the statutory mandatory minimum, and not "based on a sentencing range that has subsequently been lowered" by the sentencing commission.

Defendants then filed a petition for rehearing en banc or rehearing by the panel, noting that the Eighth Circuit ruling directly conflicts with the Fourth Circuit Court of Appeals ruling in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015). *Williams* held that defendants who initially had a statutory mandatory minimum above their guideline range were eligible for a sentence reduction based on a retroactive amendment to the guidelines, if they initially received a sentence below the mandatory minimum pursuant to a substantial assistance motion, and that their eligibility was due to application of Amendment 780 to the guidelines,

which had been promulgated by the Sentencing Commission to resolve a circuit split concerning proper guideline application in this context. The Eighth Circuit denied the petition for rehearing en banc and petition for rehearing by the panel.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully assert that they were wrongly denied eligibility for consideration for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline amendment 782. Petitioners assert that the Eighth Circuit erred in holding, contrary to the majority analysis of the Fourth Circuit in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015), that their sentences were not "based on a sentencing range that has subsequently been lowered by the sentencing commission pursuant to 28 U.S.C. § 994(*o*)." The holding to the contrary was error, and adds to a recent split in rulings by the Circuit Courts of Appeal concerning eligibility for defendants to receive the benefit of retroactive sentencing guideline amendments in cases where they were initially subject to a statutory mandatory minimum term of imprisonment, but received the benefit of the grant of a substantial assistance motion that permitted them to receive a lower sentence.

A. The Eighth Circuit Court of Appeals erred in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory guideline range was below a statutory mandatory minimum, and who were subsequently sentenced below that minimum pursuant to a reduction in sentence for substantial assistance under 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence via 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline Amendment 782.

Congress authorizes the federal courts to grant sentence reductions based on retroactive sentencing guideline amendments implemented by the United States Sentencing Commission through the statutory vehicle of 18 U.S.C. § 3582(c)(2). That statute states:

> In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The policy statement referenced in the statute is Guideline § 1B1.10. *See Dillon v. United States*, 560 U.S. 817, 819 (2010). The retroactive amendment process contemplates that the original sentence was based on the sentencing guideline system and a sentencing range that has subsequently been lowered by the Commission. This is why deviations from the guideline sentencing system risk removing a defendant from the reach of 18 U.S.C. § 3582(c)(2) and future retroactive guideline amendments. *See, e.g., United States v. Anderson*, 686 F.3d 585, 589–90 (8th Cir. 2012) ("The statutory framework does not require the Commission to make all downward departures and variances applied to the original sentence available when creating a basis for sentencing reduction.").

In the context of these consolidated cases, however, defendants were sentenced pursuant to the sentencing guideline system and processes, and their original guideline sentencing range was inherently a sentencing factor in that determination. Their original guideline sentencing range was below a statutory

mandatory minimum. But, their guideline sentencing range then had to be elevated to a guideline sentence at the statutory mandatory minimum, pursuant to § 5G1.1 of the guidelines. The original guideline sentencing range was always part of this process as it had to be calculated and was then acted upon by operation of the mandatory minimum statute and § 5G1.1. The original sentence was, therefore, based not only on the statutory mandatory minimum, but also on a "sentencing range" promulgated by the commission.

When the commission passed and made retroactive Amendment 782, it had the effect of lowering nearly all guideline ranges for defendants sentenced pursuant to the drug quantity table. Any drug sentence where the guideline sentencing range was reduced became potentially eligible for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). However, in some cases, other statutes – here 21 U.S.C. §§ 841 and 851 – resulted in a statutory mandatory minimum higher than the amended guideline sentencing range, and barred relief for some defendants. *See, e.g., United States v. Jones*, 523 F.3d 881, 882 (8th Cir. 2008) (per curiam) (finding the defendant ineligible for § 3582(c) relief because the original guideline sentence and amended guideline sentence both remained at the statutory mandatory minimum, and were therefore unaffected by the amendment to the crack quantity guidelines).

Here, as acknowledged by the Fourth Circuit, the policy statement implementing the retroactive guideline amendment permits a district court to apply the amended guideline range, without regard to the statutory mandatory minimum

term that applied at the original sentencing, only under one specific set of circumstances. *Williams*, 808 F.3d at 261. The policy statement directs that a district court may disregard the prior application of the mandatory minimum where:

> the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to the authorities . . . .

USSG § 1B1.10(c). In this scenario, the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). *Id.* This means the statutory mandatory minimum term no longer applies in proceedings to reduce sentences pursuant to 18 U.S.C. § 3582(c)(2) under these circumstances. This is precisely the scenario applicable to the defendants in these cases, and as recognized by the Fourth Circuit in *Williams*, the defendants are eligible for a reduction in sentence. The Eighth Circuit ruling to the contrary was error.

A retroactive guideline amendment is applied after the original sentencing. And for defendants who were received the grant of a motion under 18 U.S.C. § 3553(e), the statutory mandatory minimum no longer bars eligibility for a sentence reduction under the amendment. The government's filing, and the district court's granting of a substantial assistance motion pursuant to 18 U.S.C. § 3553(e), removed the applicability of the statutory mandatory minimum. Section 3582(c)(2)

then permits a district court to apply the applicable policy statements issued by the commission to effectuate the reduction. *See Williams*, 808 F.3d at 261 (discussing how the Commission's removal of applicability of § 5G1.1 in policy statement § 1B1.10(c) thereby created eligibility for relief).

The Sentencing Commission's authority to remove applicability of § 5G1.1 in implementing a retroactive guideline range reduction stems from 28 U.S.C. § 994(u): "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Commission clarified the eligibility issue by adopting the view that, when a substantial assistance motion is filed pursuant to 18 U.S.C. § 3553(e), "[t]he government's substantial assistance motion . . . 'waived' the statutory minimum and permitted the district court to impose a lower sentence based on the appellant's applicable guideline range." *In re Sealed Case*, 722 F.3d 361, 368 (D.C. Cir. 2013) (noting that comment 23 [now 24] to USSG § 2D1.1 allows for waiver of a mandatory minimum and a lower sentence imposed where a substantial assistance motion is filed).

The Commission rejected the view that defendants in such circumstances were sentenced based on their statutory mandatory minimum sentence alone, and clarified that the correct approach under the guidelines system is to calculate a guideline range based on offense level and criminal history, prior to assessing whether a mandatory minimum applies. *Id.* at 369; *accord United States v. Savani*,

733 F.3d 56, 63 n.5 (3d Cir. 2013) ("A defendant is not assigned a new offense level or criminal history category by operation of the mandatory minimum. Rather, the guideline range that is applicable to that offense level and criminal history category is simply trumped by the mandatory minimum when the sentencing court applies step § 1B1.1(a)(8)."). The Commission clarified that the "guideline range" is the offense level and criminal history based range resulting from steps one through seven of the application instructions in USSG §1B1.1, prior to the mandatory minimum becoming the "guideline sentence" by function of law. USSG § 1B1.10, cmt. 1(A) ("[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered by an amendment . . . that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a) . . . ."); *see also Sealed Case*, 722 F.3d at 369–70 ("The mandatory minimum, in other words, *acts upon* the already determined 'applicable guideline range,' it does not *become* the guideline range."). The clarification shows that even in circumstances where a mandatory minimum term applies, the guideline sentencing system is still in operation, and the guideline sentencing range is still a sentencing factor being considered by the district court in determining the ultimate sentence to impose.

Put differently, because the statutory mandatory minimum is waived by the filing of a substantial assistance motion pursuant to 18 U.S.C. § 3553(e), the Commission removed confusion caused by § 5G1.1 in the implementation of retroactive guideline amendments. This is logical; once the statutory mandatory

minimum term is no longer applicable, it is no longer required to be the "guideline sentence" in the case. Once the statutory bar is waived by the government, 18 U.S.C. § 3582(c) permits the Sentencing Commission to issue policy statements that give district courts authority to reduce a sentence that was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *See Freeman v. United States*, 564 U.S. 522, 526 (2011) (plurality opinion) ("There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range."); *Sealed Case*, 722 F.3d at 368 ("[W]ithout the bar of the mandatory minimum, no provision kept Amendment 750 from having 'the effect of lowering' the appellant's applicable guideline range, leaving the appellant eligible under the policy statement to pursue a sentence reduction."). The only limitation in place is the framework of USSG § 1B1.10 itself, which remains binding on the courts in this retroactive amendment process. *See Dillon* 560 U.S. at 826 (2010) (noting the "substantial role" Congress gave the Commission regarding sentence modifications, and that the Sentencing Reform Act gives the Commission the power to decide whether to amend the Guidelines, and charges it with determining whether and to what extent an amendment will be retroactive" (citing 28 U.S.C. §§ 994(o) and (u))); *see also* 28 U.S.C. § 994(n) (directing the Sentencing Commission to assure that the guidelines reflect the appropriateness of imposing a sentence below a statutory minimum when a defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense);

Williams, 808 F.3d at 262 (discussing how the policy statement applicable to these circumstances furthers the policy goal of rewarding cooperators that is reflected in both the guidelines and 18 U.S.C. § 3553(e)).

In short, the Sentencing Commission can be its own lexicographer, and has the ability to uncouple USSG § 5G1.1 from the calculus in the very limited context of cases where an 18 U.S.C. § 3553(e) motion has been granted. Notably, Congress could have rejected application in this manner by disapproving the retroactive amendment, but did not do so. Congress was aware of the Sentencing Commission's clarification of the circuit split concerning mandatory minimums and their application and role under the guidelines and the policy statement implementing the amendment, but adopted the policy of the Sentencing Commission to ensure that individuals who received substantial assistance motions from the Government would receive the benefit of retroactive sentencing guideline amendments.

The Eighth Circuit's ruling directly conflicts with the *Williams* ruling in the Fourth Circuit. The result is that defendants who received substantial assistance motions in some parts of the country are currently eligible for subsequent reductions in their sentences based on 18 U.S.C. § 3582(c)(2) and amendments to the sentencing guidelines, but those in the Eighth Circuit and Tenth Circuits are not. Given the likelihood of future retroactive amendments to the sentencing guidelines, this Court should grant the writ to correct the error, resolve this conflict in the law, and provide guidance to the Circuits that have not yet addressed this question.

B. *Freeman v. United States*, 564 U.S. 522 (2011) does not support the Eighth Circuit's holding that there is a substantive limitation on the term "based on" in 18 U.S.C. § 3582(c)(2) that prohibits defendants whose initial advisory guideline range was below a statutory mandatory minimum, and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), from being eligible for further reduction in sentence due to retroactive sentencing guideline Amendment 782.

In its decision, the Eighth Circuit stressed that Justice Sotomayor's concurring, and controlling, opinion in *Freeman* construed the term "based on" in 18 U.S.C. § 3582(c) "as imposing a substantive limitation on § 3582(c)(2) relief, a limitation inconsistent with the examples discussed by the Commission in Amendment 780, and with the result reached by the Fourth Circuit in *Williams*." *Koons*, 850 F.3d at 979. The Eighth Circuit's reliance on *Freeman* was inapposite in these cases.

Freeman concerned how Rule 11(c)(1)(C) plea agreements interact with 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline amendments, and as Justice Sotomayor's concurrence observed, "sentencing under a (C) agreement . . . is different [because] [a]t the time of sentencing, the term of imprisonment imposed pursuant to a (C) agreement does not involve the court's independent calculation of the Guidelines or consideration of the other 18 U.S.C. § 3553(a) factors." *Freeman*, 564 U.S. at 535 (Sotomayor, J., concurring). The controlling analysis in respect to (C) agreements involves examining the plea agreement itself, because (C) agreements are a mechanism for resolving cases that have the ability to operate either inside or outside the framework of the typical sentencing process. Justice

Sotomayor's concurrence stressed that the specific terms of the plea agreement must be examined in order to assess whether *the plea agreement* was "'based on' the agreed-upon sentencing range within the meaning of § 3582(c)(2)." *Id.* at 538 (emphasis added); *accord United States v. Logan*, 710 F.3d 856, 860 (8th Cir. 2013) (noting that the agreement of the parties controls the analysis in the (C) plea context).

Using this approach, Justice Sotomayor reasoned that § 3582(c)(2) relief should not be available in all Rule 11(c)(1)(C) cases, but should only be accorded in two categories of cases. First, § 3582(c)(2) relief is available in any case where the Rule 11(c)(1)(C) agreement makes clear that the applicable guidelines sentencing range was the basis for the agreed upon term of imprisonment. *Freeman*, 564 U.S. at 538–40 (Sotomayor, J., concurring). Thus, for example, when the Rule 11(c)(1)(C) agreement provides for sentencing within a specified guidelines sentencing range, and that range is subsequently lowered, relief is available to that defendant. *Id.* at 538–39 (Sotomayor, J., concurring). Second, Justice Sotomayor recognized that even agreements to specified terms of imprisonment can be based on a guideline sentencing range. Under this category, a Rule 11(c)(1)(C) agreement to a set term of incarceration still qualifies for § 3582(c)(2) relief when that agreed upon term was clearly based on a guidelines range that is subsequently lowered. *Id.* at 539 (Sotomayor, J., concurring). The controlling opinion in *Freeman* indicates that a sentence, even one agreed upon in a plea agreement, may be "based on" multiple factors, and where it was clearly "based on" a sentencing range that has

subsequently been lowered by the sentencing commission as one such factor, there is a potential for discretionary relief under § 3582(c)(2).

In the context of these cases, there is no Rule 11(c)(1)(C) agreement to examine. Defendants' sentences were determined both by operation of statutory law and the sentencing guidelines process, acting in concert. Nothing in these cases took them outside the traditional sentencing rubric and calculus contemplated by the guidelines sentencing system and corresponding statutes, as can be the case with a Rule 11(c)(1)(C) plea agreement or a sentence that contained a variance from the guidelines pursuant to the factors of 18 U.S.C. § 3553(a). The guideline range for these § 3553(e) defendants is a sentencing factor by operation of law — a factor de jure — because once the mandatory minimum has been removed from the calculus, the guideline sentencing range regains its inherent and overarching relevance as the polestar of federal sentencing. *Freeman*'s reading of the "based on" requirement was concerned only with the Rule 11(c)(1)(C) context. Different considerations are at play here. Rule 11(c)(1)(C) agreements are often designed to avoid the impact of the Guidelines. But the § 3553(e) motions in these cases put the sentencing process back on its more typical footing. The removal of USSG § 5G1.1's applicability is limited to cases where a § 3553(e) motion has been granted, and is a clarification of the guidelines, made by the Commission, to ensure an understanding that retroactive amendments do have an impact on the sentencing range in such circumstances at the time the amendment is considered. It is not an amendment to 18 U.S.C. § 3582(c)(2) itself.

The Eighth Circuit's ruling that the ultimate sentence in these cases was not "based on" anything more than the statutory mandatory minimum and defendants' substantial assistance reductions over-extends the analysis in *Freeman*. This invites the Court to clarify and resolve the tension between the plurality opinions in *Freeman* — whether the guideline sentencing range is a substantive factor that is always involved in determining the ultimate sentence, or whether it can become immaterial due to operation of law or other determinations made by the sentencing court.

CONCLUSION

For the foregoing reasons, Petitioners Timothy D. Koons, Kenneth Jay Putensen, Randy Feauto, Esequiel Gutierrez, and Jose Manuel Gardea, respectfully request that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX

Decision of the Eighth Circuit Court of Appeals, March 10, 2017

Eighth Circuit Court of Appeals Order Denying Petition for Rehearing or Rehearing En Banc, May 25, 2017

United States Court of Appeals
For the Eighth Circuit

No. 15-3794

United States of America

Plaintiff - Appellee

v.

Timothy D. Koons

Defendant - Appellant

No. 15-3825

United States of America

Plaintiff - Appellee

v.

Kenneth Jay Putensen

Defendant - Appellant

No. 15-3854

United States of America

Plaintiff - Appellee

v.

Randy Feauto

Defendant - Appellant

No. 15-3880

United States of America

Plaintiff - Appellee

v.

Esequiel Gutierrez

Defendant - Appellant

No. 15-3894

United States of America

Plaintiff - Appellee

v.

Jose Manuel Gardea

Defendant - Appellant

PETITIONERS' APPENDIX A, Page 2 of 12

Appellate Case: 15-3794 Page: 2 Date Filed: 03/10/2017 Entry ID: 4510830

23

Appeals from United States District Court
for the Northern District of Iowa - Sioux City

Submitted: October 19, 2016
Filed: March 10, 2017

Before WOLLMAN, LOKEN, and BENTON, Circuit Judges.

LOKEN, Circuit Judge.

In these consolidated appeals, five defendants convicted of methamphetamine conspiracy offenses appeal denial of their motions for sentence reductions under 18 U.S.C. § 3582(c)(2). For all five, the initial advisory guidelines range was entirely below the statutory mandatory minimum, and each was sentenced below that minimum after the district court granted government motions for § 3553(e) substantial assistance departures. The question is whether § 3582(c)(2) relief is now available because Amendment 782 to the Guidelines retroactively reduced by two levels the base offense levels assigned to drug quantities, lowering the advisory guidelines range for most drug offenses. We conclude that these defendants are not cligible for a § 3582(c)(2) reduction because their sentences were not "based on" a guidelines range subsequently lowered by the Sentencing Commission. Thus, we affirm the district court's denial of sentencing reductions on a different ground.

I.

In November 2012, Randy Feauto pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine and unlawful possession of a firearm. Feauto's advisory guidelines range was 168 to 210 months in prison, but the conspiracy offense mandated a statutory minimum 20-year sentence, which

became his guidelines sentence under U.S.S.G. § 5G1.1(b). The government moved for a substantial assistance downward departure. See 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1. The government recommended a ten percent reduction because Feauto had continued dealing drugs while assisting law enforcement by making controlled buys from drug dealers. The district court imposed a 132-month sentence, 45 percent below the mandatory minimum.

After Amendment 782 became effective on November 1, 2014, the district court initiated a § 3582(c)(2) proceeding to determine whether Feauto was eligible for a sentence reduction. The United States Probation Office calculated his amended guidelines range to be 121 to 151 months in prison, disregarding § 5G1.1 of the Guidelines, as U.S.S.G. § 1B1.10(c) instructs. Promulgated by the Commission in Amendment 780, § 1B1.10(c) provides, with emphasis added:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance. If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the *amended guideline range shall be determined without regard to the operation of § 5G1.1* (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

This appeared to make Feauto eligible for discretionary § 3582(c)(2) relief that could reduce his sentence to as low as 67 months, a reduction comparable to the initial 45 percent substantial assistance reduction. See U.S.S.G. § 1B1.10, cmt. n.4.

At the § 3582(c)(2) motion hearing, the district court commented, "I don't see how a retroactive guideline can essentially trump a mandatory minimum like it does in this case," and ordered briefing on the issue. The government and Feauto agreed

he was eligible for a reduction, but disagreed as to whether the district court should exercise its discretion to reduce his sentence. After giving the parties an opportunity to comment on its tentative decision, the court ruled that the Sentencing Commission exceeded its authority in promulgating a guideline, § 1B1.10(c), that nullifies the statutory minimum sentence, or that Congress violated the non-delegation doctrine and separation-of-powers principles if it granted that authority. Accordingly, the district court concluded, Feauto was not eligible for § 3582(c)(2) relief because he "was subject to a mandatory minimum sentence exceeding both his original guideline range and his amended guideline range." United States v. Feauto, 146 F. Supp. 3d 1022, 1041 (N.D. Iowa 2015). This decision was consistent with controlling Eighth Circuit precedent prior to the adoption of § 1B1.10(c) in November 2014. See United States v. Moore, 734 F.3d 836, 838 (8th Cir. 2013).

The other four appellants were likewise convicted of drug conspiracy offenses mandating statutory minimum sentences greater than their entire advisory guidelines ranges -- Timothy Koons (20-year mandatory minimum), Kenneth Jay Putensen (life), Jose Gardea (10 years), and Esequiel Gutierrez (20 years). Each was granted a substantial assistance reduction below the mandatory minimum sentence -- Koons to 180 months (25 percent); Putensen to 264 months (35 percent); Gardea to 84 months (30 percent); and Gutierrez to 192 months (36 percent). Amendment 782 lowered their amended guidelines ranges further below the mandatory minimum, calculated in accordance with § 1B1.10(c). The district court denied § 3582(c)(2) sentencing reductions, relying on its ruling in Feauto. These appeals followed. We review defendants' eligibility for § 3582(c)(2) sentence reductions *de novo*. United States v. Bogdan, 835 F.3d 805, 807 (8th Cir. 2016).

II.

Providing a rare exception to the finality of criminal judgments, § 3582(c)(2) allows a district court to reduce the sentence of "a defendant who has been sentenced

to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The applicable policy statement, U.S.S.G. § 1B1.10, provides that a defendant is eligible for a discretionary § 3582(c)(2) reduction if his applicable guidelines range is lowered by a retroactive amendment listed in § 1B1.10(d), such as Amendment 782. See U.S.S.G. § 1B1.10(a). The extent of a § 3582(c)(2) reduction is normally limited to the bottom of the amended guidelines range, but if the defendant initially received a sentence below the initial guidelines range by reason of a substantial assistance reduction, "a reduction comparably less than the amended guideline range . . . may be appropriate." § 1B1.10(b)(2)(B).

For a defendant to be eligible for § 3582(c)(2) relief under U.S.S.G. § 1B1.10(a), Amendment 782 must lower his applicable guideline range. A conflict in the circuits developed regarding how to determine eligibility when the applicable guidelines range is affected by a mandatory minimum sentence. Some circuits held that a retroactive amendment did not have the effect of lowering the defendant's applicable guidelines range because, by reason of § 5G1.1(b), the amended and original range were both determined by the mandatory minimum. See, e.g., United States v. Joiner, 727 F.3d 601, 608-09 (6th Cir. 2013), cert. denied, 134 S. Ct. 1357 (2014); United States v. Johnson, 732 F.3d 109, 114-15 (2d Cir. 2013); United States v. Baylor, 556 F.3d 672, 673 (8th Cir. 2009). In promulgating § 1B1.10(c), the Commission explained that "circuits are split over what to use as the bottom of the [amended] range." The Commission "generally adopt[ed]" the approach of the Third Circuit and the D.C. Circuit – when a defendant's initial guidelines range was entirely below the mandatory minimum, "the bottom of the amended range [is] . . . the

bottom of the Sentencing Table guideline range," disregarding § 5G1.1(b). U.S.S.G. App. C, Amend. 780, at 56 (Supp. 2015), citing United States v. Savani, 733 F.3d 56, 66-67 (3d Cir. 2013), and In re Sealed Case, 722 F.3d 361, 369-70 (D.C. Cir. 2013).[1]

The government's interpretation of § 1B1.10(c) makes defendants eligible for § 3582(c)(2) reductions, contrary to our controlling prior precedents. See Moore, 734 F.3d at 838; Baylor, 556 F.3d at 673. On appeal, the government argues that § 1B1.10(c) requires us to reexamine these precedents and urges us to follow the Fourth Circuit panel majority in United States v. Williams, 808 F.3d 253 (4th Cir. 2015). Defendants are eligible for discretionary § 3582(c)(2) reductions, the government argues, because § 3582(c)(2) authorizes a reduction based on a defendant's substantial assistance if it is "consistent with applicable policy statements issued by the Sentencing Commission."

As we noted in Bogdan, 835 F.3d at 807, the government, like the Commission, ignores a critical "threshold question" raised by the plain language of § 3582(c)(2), namely, whether each defendant was sentenced "*based on* a sentencing range that has subsequently been lowered by the Sentencing Commission." § 3582(c)(2) (emphasis added); see Dillon v. United States, 560 U.S. 817, 821 (2010). Like the defendants in this case, Joseph Bogdan's guidelines range was entirely below the mandatory minimum, and he received an initial sentence below the mandatory minimum for his substantial assistance. We did not answer this threshold question in Bogdan because that case turned on the application of the Supreme Court's decision in Freeman v.

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[1]In deciding these appeals, we accept the Commission's resolution of conflicting judicial interpretations of the term "applicable guideline range" in U.S.S.G. § 1B1.10(a). "[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation" provided it does not violate the Constitution or a federal statute and is not plainly erroneous. Stinson v. United States, 508 U.S. 36, 46 (1993). The district court concluded that § 1B1.10(c) is constitutionally flawed, an issue we do not address.

United States, 564 U.S. 522 (2011), to defendant Bogdan's Rule 11(c)(1)(C) plea agreement. But we were "inclined to agree with Fourth Circuit Chief Judge William Traxler that, in this situation, the sentence would not be based on a range the Sentencing Commission subsequently lowered, 'because it was not based on a *sentencing range* in the first instance.'" Id. at 808, quoting Williams, 808 F.3d at 264 (Traxler, C.J., dissenting). "The more logical interpretation would be that the [term of imprisonment] was based on the mandatory minimum, not on a guidelines range." Bogdan, 835 F.3d at 809.

With the issue now fully briefed and argued, we adhere to our tentative conclusion in Bogdan. When the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point. See United States v. Billue, 576 F.3d 898, 904-05 (8th Cir.), cert. denied, 558 U.S. 1058 (2009). Any "reduction below the statutory minimum must be based exclusively on assistance-related considerations." United States v. Williams, 474 F.3d 1130, 1131 (8th Cir. 2007); see Feauto, 146 F. Supp. 3d at 1036, 1039. In these cases, each defendant's prison term was "based on" his statutory mandatory minimum sentence and his substantial assistance. The guidelines range "artificially established by § 5G1.1(b)" depended upon the mandatory minimum. Bogdan, 835 F.3d at 809. If § 5G1.1(b) did not exist, the district court would still have set these defendants' sentences at the mandatory minimum before considering a substantial assistance departure. And if initially sentenced today with Amendment 782 in effect, the defendants would be "stuck with that mandatory minimum sentence as a 'starting point' for any substantial assistance reduction." Feauto, 146 F. Supp. 3d at 1037. "In essence, the advisory sentencing range became irrelevant." Williams, 808 F.3d at 264 (Traxler, C.J., dissenting).

We respectfully decline to follow the Fourth Circuit panel majority in Williams. In United States v. Hood, 556 F.3d 226 (4th Cir.), cert. denied, 558 U.S.

921 (2009), an earlier Fourth Circuit panel concluded: "Because Hood's 240-month Guidelines sentence was based on a statutory minimum and U.S.S.G. § 5G1.1(b), it was not *based on* a sentencing range lowered by Amendment 706, and at this point in the analysis, Hood would not be eligible for a reduced sentence under § 3582(c)(2)." Hood, 556 F.3d at 233. Likewise, in Moore, 734 F.3d at 838, we held that "Moore's sentence was based on a statutory mandatory minimum term of imprisonment. Accordingly, Amendment 750 does not apply . . . and Moore is not eligible for relief under section 3582(c)(2)." Then-Chief Judge Traxler's dissent in Williams specifically relied on Hood's statutory "based on" analysis, 808 F.3d at 265-66, yet the Williams majority concluded that Hood was simply "inapplicable" after Amendment 780, ignoring altogether that "based on" is a statutory prerequisite of § 3582(c)(2) eligibility, id. at 261.

The Commission in Amendment 780 also ignored this "based on" statutory requirement, despite numerous circuit court decisions such as Hood and Moore that had considered this a critical, if not determinative, issue. For example, in "generally" adopting the Third Circuit and D.C. Circuit "approach," the Commission did not acknowledge the D.C. Circuit's analysis of the "based on" requirement in In re Sealed Case, 722 F.3d at 365-66, nor the fact that the Third Circuit in Savani, 733 F.3d at 67, after concluding that "applicable guideline range" in § 1B1.10(a)(2)(B) was ambiguous and should be construed in favor of the defendants under the Rule of Lenity, remanded for consideration of whether defendants' sentences were "based on" a guidelines range in light of Freeman. See also United States v. Glover, 686 F.3d 1203, 1208 (11th Cir. 2012).

The Commission's failure to consider the meaning of the term "based on" in § 3582(c)(2) is especially perplexing given the Supreme Court's recent decision in Freeman. That case turned on whether a defendant who was sentenced in accordance with a Rule 11(c)(1)(C) plea agreement was *ineligible* for a § 3582(c)(2) reduction because his sentence was "based on" the plea agreement, rather than on a lowered

sentencing range. Five Justices held that the sentence was based on the plea agreement. See 564 U.S. at 535 (Sotomayor, J., concurring), 545 (Roberts, C.J., dissenting). The dissenters acknowledged that a defendant's sentence is "based on" a guidelines range when his Rule 11(c)(1)(C) plea agreement "expressly provid[ed] that the court will sentence the defendant within an applicable Guidelines range." Id. at 546. Justice Sotomayor concurred in the result, concluding the defendant is also eligible for relief if the plea agreement "make[s] clear that the basis for the specified [prison] term is [an applicable] Guidelines sentencing range." Id. at 539. The plurality, in the minority on this issue, concluded that the sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement is "based on" the applicable guidelines range considered by the district court in accepting the agreement. Id. a 529.

The reasoning *of all nine Justices* in Freeman required a greater substantive relationship between the plea agreement and a guidelines range than the fictional relationship between a mandatory minimum sentence required by statute and a guidelines "range" determined by § 5G1.1(b). A § 5G1.1(b) artificial range in no substantive way "serves as the basis or foundation for the term of imprisonment." Id. at 535 (Sotomayor, concurring). Justice Sotomayor's concurring opinion controls in construing Freeman. See United States v. Browne, 698 F.3d 1042, 1045 (8th Cir. 2012), cert. denied, 133 S. Ct. 1616 (2013). But all nine Justices construed the term "based on" as imposing a substantive limitation on § 3582(c)(2) relief, a limitation inconsistent with the examples discussed by the Commission in Amendment 780, and with the result reached by the Fourth Circuit majority in Williams.

Congress has declared that the Commission's guidelines and policy statements shall "establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." 28 U.S.C. § 994(b)(1). But the Commission's interpretation of § 3582(c)(2) ignores the statute's plain text as construed in Freeman -- defendants' sentences were "based on" the mandatory minimum and their

substantial assistance, not on "a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Once the Supreme Court determines the meaning of a statute, courts "assess an agency's later interpretation of the statute against that settled law." Neal v. United States, 516 U.S. 284, 295 (1996). "[T]he Commission does not have the authority to amend [a] statute" the Supreme Court has construed. Id. at 290; see United States v. Stoneking, 60 F.3d 399, 402 (8th Cir. 1995) (en banc). "If the Commission's revised commentary is at odds with [§ 3582(c)(2)'s] plain language, it must give way." United States v. LaBonte, 520 U.S. 751, 757 (1997). Nor can "the Sentencing Commission . . . overrule circuit precedent interpreting a *statutory* provision." Williams, 808 F.3d at 266 (Traxler, C.J., dissenting).[2]

For these reasons, we conclude that the defendants are ineligible for § 3582(c)(2) sentencing reductions because their initial sentences were not "based on" a guidelines range lowered by Amendment 782. Accord United States v. C.D., No. 15-3318+, 2017 WL 694483 (10th Cir. Feb. 22, 2017). Accordingly, the district court orders denying § 3582(c)(2) reductions are affirmed.

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[2]The original Commentary to § 5G1.1 stated, more plainly than the amended version, "[i]f the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control." U.S.S.G. App. C, Vol. 1, Amend. 286.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-3794

United States of America

Plaintiff - Appellee

v.

Timothy D. Koons

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:10-cr-04031-MWB-2)

JUDGMENT

Before WOLLMAN, LOKEN and BENTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 10, 2017

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-3794

United States of America

Appellee

v.

Timothy D. Koons

Appellant

No: 15-3825

United States of America

Appellee

v.

Kenneth Jay Putensen

Appellant

No: 15-3854

United States of America

Appellee

v.

Randy Feauto

Appellant

No: 15-3880

United States of America

Appellee

v.

Esequiel Gutierrez

Appellant

No: 15-3894

United States of America

Appellee

v.

Jose Manuel Gardea

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:10-cr-04031-MWB-2)
(3:07-cr-03008-MWB-1)
(3:12-cr-03046-MWB-1)
(5:14-cr-04016-MWB-1)
(5:14-cr-04017-MWB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

May 25, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

RECORD AND BRIEFS

No. 17-5716

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant who is subject to a statutory mandatory minimum sentence, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. 3553(e), is eligible for a further sentence reduction under 18 U.S.C. 3582(c)(2), when the Sentencing Commission retroactively lowers the advisory Sentencing Guidelines range that would have applied in the absence of the statutory mandatory minimum.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-5716

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 850 F.3d 973. The opinion of the district court is reported at 146 F. Supp. 3d 1022.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12) was entered on March 10, 2017. A petition for rehearing was denied on May 25, 2017 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on August 22, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Northern District of Iowa, petitioners Timothy D. Koons, Kenneth Jay Putensen, Randy Feauto, Esequiel Gutierrez, and Jose Manuel Gardea were convicted, in separate criminal cases, of conspiracy to distribute a controlled substance (methamphetamine), in violation of 21 U.S.C. 846, and other offenses. See Pet. App. A3. Petitioners Koons, Putensen, Feauto, Gutierrez, and Gardea were sentenced, respectively, to 180, 264, 132, 192, and 84 months in prison. Id. at A5. After the Sentencing Commission lowered the advisory Sentencing Guidelines ranges for most drug offenses, see Sentencing Guidelines App. C Supp., Amend. 782, 788 (Nov. 1, 2014), the court requested, on its own motion, that the parties address whether petitioners should receive sentence reductions pursuant to 18 U.S.C. 3582(c)(2). The district court denied the reductions, finding petitioners ineligible. Pet. App. A5. The court of appeals affirmed. Id. at A1-A11.

1. This joint petition is brought by five petitioners who, at various points between 2008 and 2014, pleaded guilty to conspiracy to distribute methamphetamine (among other offenses) after having been convicted of one or more prior felony drug offenses. As set forth below, all five petitioners were subject to a statutory mandatory-minimum sentence that exceeded the otherwise-applicable advisory Guidelines range, but substantially

assisted the government and received sentences below the mandatory minimum pursuant to 18 U.S.C. 3553(e). See Pet. App. A3-A5.

a. In 2010, petitioner Koons pleaded guilty to conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 846, and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1). Presentence Investigation Report (Koons PSR) ¶¶ 2, 3, 8. Because he had a prior felony drug conviction, petitioner Koons was subject to a mandatory minimum sentence of 20 years in prison, 21 U.S.C. 841(b)(1)(A)(viii). Koons PSR ¶¶ 7, 40, 91. That mandatory minimum was also the sentence indicated by the federal Sentencing Guidelines, pursuant to Sentencing Guidelines § 5G1.1(b), which provides that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." The Probation Office calculated that the advisory sentencing range that would have applied under the then-applicable 2009 Sentencing Guidelines had petitioner Koons not been subject to that statutory mandatory minimum was 151 to 188 months in prison. Koons PSR ¶ 92. The government moved for a departure from the mandatory-minimum sentence, pursuant to 18 U.S.C. 3553(e), to reflect petitioner Koons's substantial assistance, see Koons Sentencing Hr'g Mins., and the district court sentenced him

to 180 months in prison, to be followed by ten years of supervised release. Koons Original J. 2-3.

b. In 2008, petitioner Putensen pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846. Presentence Investigation Report (Putensen PSR) ¶ 1. Because he had two prior felony drug convictions, petitioner Putensen was subject to a mandatory minimum sentence of life imprisonment, 21 U.S.C. 841(b)(1)(A)(viii). Putensen PSR ¶¶ 2, 27, 41, 45, 83. Without the mandatory minimum, his advisory guidelines range would have been 188 to 235 months in prison. Id. ¶ 83. After granting the government's substantial-assistance motion, see Putensen Sentencing Tr. 3, 20, the district court sentenced petitioner Putensen to 264 months in prison, to be followed by ten years of supervised release. Putensen Original J. 2-3.

c. In 2013, petitioner Feauto pleaded guilty to conspiracy to manufacture methamphetamine and distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846, and unlawful possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Presentence Investigation Report (Feauto PSR) ¶¶ 1-2. Because he had a prior felony drug conviction, petitioner Feauto was subject to a mandatory minimum sentence of 20 years in prison, 21 U.S.C. 841(b)(1)(A)(viii). Feauto PSR ¶¶ 48, 75. Without the mandatory minimum, his advisory guidelines range would have been 168 to 210

months in prison. Id. ¶ 76. After granting the government's substantial-assistance motion, see Feauto Sentencing Tr. 3, 27, the district court sentenced petitioner Feauto to 132 months in prison, to be followed by ten years of supervised release. Feauto Original J. 2-3.

d. In 2014, petitioner Gutierrez pleaded guilty to conspiracy to distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846. Presentence Investigation Report (Gutierrez PSR) ¶¶ 1, 3. Because he had a prior felony drug conviction, petitioner Gutierrez was subject to a mandatory minimum sentence of 20 years in prison, 21 U.S.C. 841(b)(1)(A)(viii). Gutierrez PSR ¶¶ 1, 26, 71. Without the mandatory minimum, his advisory guidelines range would have been 188 to 235 months in prison. Id. ¶ 72. After granting the government's substantial-assistance motion, see Gutierrez Sentencing Hr'g Mins., the district court sentenced petitioner Gutierrez to 192 months in prison, to be followed by ten years of supervised release. Gutierrez Original J. 2-3.

e. In 2014, petitioner Gardea pleaded guilty to conspiracy to distribute 5 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846. Presentence Investigation Report (Gardea PSR) ¶¶ 1, 3. Because he had a prior felony drug conviction, petitioner Gardea was subject to a mandatory minimum sentence of 10 years in prison, 21 U.S.C. 841(b)(1)(B)(viii).

Gardea PSR ¶¶ 1, 26, 76. Without the mandatory minimum, his advisory guidelines range would have been 70 to 87 months in prison. Id. ¶ 77. After granting the government's substantial-assistance motion, see Gardea Sentencing Hr'g Mins., the district court sentenced petitioner Gardea to 84 months in prison, to be followed by eight years of supervised release. Gardea Original J. 2-3.

2. a. A court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). One exception is specified in 18 U.S.C. 3582(c)(2), which provides that a court "may reduce" the sentence of a "defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," ibid., after considering the applicable statutory sentencing factors set forth in 18 U.S.C. 3553(a), "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2).

b. In November 2014, the Sentencing Commission issued Amendment 782 to the Sentencing Guidelines, which reduced by two levels the base offense level corresponding to certain drug quantities. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The Commission also made Amendment 782 retroactive, with the caveat that a court may "not order a reduced term of imprisonment based on Amendment 782 unless the effective date of

the court's order is November 1, 2015, or later." Id. Amend. 788 (Nov. 1, 2014).

c. In 2015, the district court issued, on its own motion, orders directing petitioners and the government to address whether petitioners should receive sentence reductions pursuant to 18 U.S.C. 3582(c)(2). See, e.g., Koons D. Ct. Doc. 89 (Mar. 6, 2015). Petitioners contended that they were eligible under the statute and requested reductions from the amended guidelines ranges that would apply in the absence of a mandatory minimum proportional to the reductions from the mandatory minimums that they received at their initial sentencings. See, e.g., Koons D. Ct. Doc. 96 at 2 (July 17, 2015).

With respect to eligibility, petitioners relied on the policy statement in Section 1B1.10(c) of the Guidelines to argue that the district court should disregard the mandatory minimums. See, e.g., Koons D. Ct. Doc. 96 at 2. Section 1B1.10(c) directs a court considering a sentence reduction motion to determine a defendant's "amended guideline range * * * without regard to the operation of §5G1.1" of the Guidelines -- the section under which the mandatory minimum is (if necessary) incorporated into the guidelines range -- when a case "involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial

assistance to authorities." Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014). The government agreed that petitioners were eligible to be considered for sentence reductions, but maintained that the district court should, in its discretion, decline to grant reductions in petitioners' cases or, at most, grant lesser reductions than those urged by petitioners. See, e.g., Koons Gov't Section 3582(c)(2) Report at 2.

The district court denied petitioners' requests for sentence reductions, finding them ineligible under 18 U.S.C. 3582(c)(2). The court set forth its rationale in petitioner Feauto's case. 146 F. Supp. 3d 1022. The court reasoned that Section 1B1.10(c) amounted to "a complete 'nullification' or 'disregarding' of the mandatory minimum" because the substantial assistance reduction in the amended sentence would be "entirely detached from, or made without regard to, the mandatory minimum." Id. at 1030. The court explained that such an outcome would exceed the Sentencing Commission's statutory authority because Congress did not authorize the Commission to ignore or rewrite statutory mandatory minimums. Id. at 1035.[1]

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[1] The district court also stated that if Congress did "tacitly" grant the Commission authority to promulgate Section 1B1.10(c), the statute would violate the non-delegation doctrine and separation-of-powers principles. 146 F. Supp. 3d at 1040. The court of appeals declined to address that alternative reasoning. See Pet. App. A7 n.1.

3. The court of appeals affirmed. Pet. App. A1-A11. The court explained that petitioners were not eligible for sentence reductions under Section 3582(c)(2) because their sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Id. at A7 (quoting 18 U.S.C. 3582(c)(2)). Rather, the court determined, petitioners' sentences were "based on" the statutory mandatory minimum and their substantial assistance. Id. at A8.

The court of appeals observed that "[w]hen the district court grants * * * a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point." Pet. App. A8. The court further observed that Section 3533(e) -- the statute allowing a court to impose a sentence below the mandatory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense," 18 U.S.C. 3553(e) -- requires that "[a]ny 'reduction below the statutory minimum * * * be based exclusively on assistance-related considerations.'" Pet. App. A8 (quoting United States v. Williams, 474 F.3d 1130, 1131 (8th Cir. 2007)). The court accordingly concluded that "[i]n these cases, each [petitioner's] prison term was 'based on' his statutory mandatory minimum sentence and his substantial assistance," without regard to any other guidelines range. Ibid.

The court of appeals found support for its conclusion in the fact that "the district court would still have set these [petitioners'] sentences at the mandatory minimum before considering a substantial assistance departure," even if the Sentencing Guidelines did not themselves require that the mandatory minimum become the guidelines range. Pet. App. A8. The court noted that even if "initially sentenced today," under the amended Guidelines, petitioners would be "stuck with the mandatory minimum sentence as a starting point for any substantial assistance reduction." Ibid. (internal quotation marks and citation omitted). "In essence," the court explained, "the advisory sentencing range became irrelevant." Ibid. (citation omitted).

The court of appeals also found support for its conclusion in this Court's decision in Freeman v. United States, 564 U.S. 522 (2011). See Pet. App. A9-A10. The question in Freeman was whether a defendant who pleaded guilty under a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement recommending a specific sentence is eligible for a Section 3582(c)(2) reduction if his Guidelines range, which was also set forth in the plea agreement, is subsequently lowered. The court of appeals reasoned from the three separate opinions in Freeman that "all nine Justices construed the term 'based on' as imposing a substantive limitation on § 3582(c)(2) relief" -- a limitation "inconsistent" with applying Section 1B1.10(c) as petitioners urged. Pet. App. A10.

The court of appeals noted that the Tenth Circuit had recently reached a similar conclusion in United States v. C.D., 848 F.3d 1286 (2017), petition for cert. pending, No. 16-9672 (filed June 20, 2017). The court also recognized (Pet. App. A8-A9) that its holding diverged from that of the Fourth Circuit's divided panel decision in United States v. Williams, 808 F.3d 253 (2015); see id. at 263 (Traxler, C.J., dissenting).

ARGUMENT

Petitioners contend (Pet. 9) that the Sentencing Commission's adoption of Amendment 782 made them "eligib[le] for consideration for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2)" without regard to the fact that they are subject to statutory mandatory minimums. Although the government did not object to that position below, the government now agrees with the court of appeals' decision in this case and with the Tenth Circuit's holding in United States v. C.D., 848 F.3d 1286 (2017), petition for cert. pending, No. 16-9672 (filed June 20, 2017), that defendants in petitioners' position are not eligible for sentence reductions under Section 3582(c)(2) because their initial sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2). Rather, such defendants were sentenced "based on" the statutory mandatory minimum, which became their "guideline sentence" under Sentencing Guidelines § 5G1.1(b), and which the Commission cannot lower.

Because the court of appeals correctly resolved the question presented and because the limited conflict identified by petitioners is recent, shallow, and unripe for this Court's intervention, no further review is warranted.[2]

1. A defendant who is subject to a statutory mandatory minimum that exceeds the otherwise-applicable guidelines range, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. 3553(e), is not eligible for a subsequent sentence reduction under 18 U.S.C. 3582(c)(2).

a. Section 3582(c)(2) sets forth a "narrow exception[]" to the "rule of finality" that generally governs federal criminal sentences. Freeman v. United States, 564 U.S. 522, 526 (2011) (plurality opinion). Section 3582(c)(2) provides in full:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(2).

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[2] Other pending petitions also raise the question presented by petitioners here. See Kasowski v. United States, No. 16-9649 (filed June 16, 2017); Richter v. United States, No. 16-9695 (filed June 20, 2017); C.D., No. 16-9672, supra; Rodriguez-Soriano v. United States, No. 17-6292 (filed Oct. 6, 2017).

The plain text of Section 3582(c)(2) explicitly creates a threshold eligibility requirement that limits relief to cases in which the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see Freeman, 564 U.S. at 527 (plurality opinion); id. at 534-535 (Sotomayor, J., concurring in the judgment); id. at 544-545 (Roberts, C.J., dissenting). That threshold eligibility requirement renders Section 3582(c)(2) inapplicable to defendants who were sentenced pursuant to a statutory mandatory minimum sentence that exceeds the otherwise-applicable guidelines range. Such a defendant's sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). It was "based on" the mandatory minimum, which also became "the guideline sentence" under Sentencing Guidelines § 5G1.1(b), and which the district court was "bound" to enforce, Kimbrough v. United States, 552 U.S. 85, 107 (2007).

In such a case, the Sentencing Commission does not "subsequently * * * lower[]" the applicable "sentencing range" when, as in its adoption of Amendment 782, it lowers the sentencing range that would apply if a defendant were not subject to a mandatory minimum. 18 U.S.C. 3582(c)(2). The Commission, in fact, could not lower a sentencing range premised on a mandatory minimum, because the "Commission does not have the authority to amend [a]

statute." Neal v. United States, 516 U.S. 284, 290 (1996). The Commission policy statement governing Section 3582(c)(2) sentence reductions expressly recognizes as much, noting that a sentence reduction "is not authorized under 18 U.S.C. § 3582(c)(2)" if an amendment to the Guidelines "does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)." Sentencing Guidelines § 1B1.10, comment. (n.1(A) (emphasis omitted)).

b. As the decision below and two other courts of appeals have recognized, a defendant was likewise not sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2), when he is subject to a mandatory minimum that exceeds the otherwise-applicable guidelines range but received a lower sentence, pursuant to 18 U.S.C. 3553(e), that accounted for his substantial assistance to the government. Pet. App. A7-A8; C.D., 848 F.3d at 1289; see also United States v. Rodriguez-Soriano, 855 F.3d 1040, 1044-1046 (9th Cir. 2017) (holding that a defendant was ineligible for a sentence reduction under Section 3582(c)(2) because the transcript in his case made clear that his sentence was "based on" the mandatory

minimum), petition for cert. pending, No. 17-6292 (filed Oct. 6, 2017).[3]

Section 3553(e) provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. 994].

18 U.S.C. 3553(e). Section 3553(e) thus provides statutory authority for a court to impose a sentence below a mandatory minimum, but it expressly ties such a departure to the sentence "established by statute as a minimum sentence" and expressly limits the extent of that departure to a reflection of the defendant's substantial assistance. Ibid. Indeed, every court of appeals to address the question has concluded that a Section 3553(e) departure "must be based exclusively on assistance-related considerations," not on any other considerations embodied in the Guidelines. Pet. App. A8 (emphasis added; citation omitted); accord United States v. Winebarger, 664 F.3d 388, 396 (3d Cir. 2011) (collecting cases), cert. denied, 134 S. Ct. 181 (2013).

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[3] By contrast, when a defendant's guidelines range is above the mandatory minimum, the court must consider that guidelines range in its sentencing decision, and the defendant accordingly may be eligible for a Section 3582(c)(2) reduction if the guidelines range is subsequently lowered by the Sentencing Commission. See, e.g., United States v. Freeman, 586 Fed. Appx. 237 (7th Cir. 2014).

c. Petitioners' contrary contentions lack merit. Petitioners, like the government in the proceedings below, rely on the policy statement appearing at Section 1B1.10(c) of the Guidelines. That statement provides:

> If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014). Under that directive, a court considering a Section 3582(c)(2) sentence reduction motion by a defendant who received a substantial assistance reduction would calculate the "amended guideline range" without regard to the mandatory minimum. Ibid. In petitioner Feauto's case, for example, the guidelines range after Amendment 782 (absent the mandatory minimum) was 168 to 210 months, so the Section 1B1.10(c) policy statement would set that as his "amended guideline range," ibid., irrespective of Section 5G1.1(b)'s instruction that, in an ordinary case, a superseding statutory minimum becomes the "guideline sentence," Sentencing Guidelines § 5G1.1(b).

The policy statement, however, does not eliminate or supersede the statutory requirement that a defendant's original sentence have been "based on a sentencing range that has

subsequently been lowered by the Sentencing Commission" in order to qualify for a sentence reduction. 18 U.S.C. 3582(c)(2). The policy statement appears, instead, to assume -- as do petitioners, see, e.g., Pet. 12, 14 -- that any sentence involving a substantial assistance departure from a mandatory minimum satisfies that prerequisite. As explained above, that assumption is unwarranted. When a defendant in petitioners' position receives a substantial assistance departure, the resulting sentence is still "based on" the mandatory minimum (which is also incorporated through Sentencing Guidelines § 5G1.1(b), a provision the Commission does not purport to amend) with a departure only to "reflect a defendant's substantial assistance," 18 U.S.C. 3553(e). Therefore, as multiple courts of appeals have recognized, granting a Section 3582(c)(2) reduction to a defendant in petitioners' position effectively reads the threshold "based on" requirement in Section 3582(c)(2) "out of the statute." Rodriguez-Soriano, 855 F.3d at 1045; see Pet. App. A9-A10. The Commission's policy statement cannot permissibly be read to have that effect. See United States v. LaBonte, 520 U.S. 751, 757 (1997) (explaining that guidelines provision "at odds with [the] plain language" of a statute "must give way" to "the specific directives of Congress"); accord id. at 760 (rejecting Commission position that would "largely eviscerate" statutory requirement and render it "a virtual nullity").

Petitioners contend (Pet. 16) that the Sentencing Commission "can be its own lexicographer" and supersede the ordinary effect of Sentencing Guidelines § 5G1.1(b) "in the very limited context of cases where an 18 U.S.C. § 3553(e) motion has been granted." Amendment 782, however, did not purport to amend Sentencing Guidelines § 5G1.1(b) or change how that provision operates in the computation of a defendant's initial sentence. See Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014). And, in any event, the Commission lacks authority to amend or supersede the statutory mandatory minimum or the statutory requirement that substantial-assistance reductions below a defendant's mandatory minimum be based exclusively on assistance-related considerations.

Contrary to petitioners' contention (Pet. 17-20), the court of appeals correctly recognized that petitioners' ineligibility for a sentence reduction under Section 3582(c)(2) is supported by Freeman, supra. Freeman addressed the applicability of 18 U.S.C. 3582(c)(2) in the context of Rule 11(c)(1)(C) plea agreements. See 564 U.S. at 525 (plurality). Although no opinion in Freeman commanded the vote of five Justices, all nine Justices read Section 3582(c)(2)'s "based upon" requirement to constitute a "substantive" threshold requirement that limits sentencing reductions to cases in which the otherwise-applicable Guidelines range could affect the sentence imposed. See id. at 529; id. at 535-536 (Sotomayor, J., concurring in the judgment); id. at 544

(Roberts, C.J., dissenting). That requirement is not met where, as here, the sentencing court is required to base any departure from the statutory mandatory minimum exclusively on substantial-assistance-related considerations. See p. 15, supra.

2. As petitioners note (Pet. 8-9, 16), a limited conflict exists between the Eighth and Tenth Circuits, which have held that defendants in petitioners' position are not eligible for sentence reductions under Section 3582(c)(2), see Pet. App. A8-A9; C.D., 848 F.3d at 1289, and the Fourth Circuit, which has held in a divided decision that defendants in petitioners' position may receive such reductions, see United States v. Williams, 808 F.3d 253, 260-263 (2015); id. at 263-266 (Traxler, C.J., dissenting). The Ninth Circuit has adopted an intermediate approach, holding that defendants in petitioners' position are eligible for sentence reductions under Section 3582(c)(2) only if the sentencing transcript or other record materials in that particular case indicate that the defendant's sentence was "based on" a subsequently lowered guidelines range rather than the mandatory minimum incorporated as the guideline sentence. Rodriguez-Soriano, 855 F.3d at 1044-1046.

That limited conflict does not warrant this Court's intervention at this time. The disagreement is of recent vintage, and only one court of appeals (the Fourth Circuit in Williams) has taken a position inconsistent with the decision below. The

dissenting judge in Williams, moreover, viewed that decision to conflict with the Fourth Circuit's own prior holding in United States v. Hood, 556 F.3d 226, 233, cert. denied, 558 U.S. 921 (2009), where another panel held, before Section 1B1.10(c) was promulgated, that the sentence of a defendant in petitioners' position "was not 'based on' the sentencing range * * * that was [subsequently] lowered by" a Guidelines amendment. Id. at 236; see Williams, 808 F.3d at 264-266 (Traxler, C.J., dissenting). Particularly because Williams predated the government's reconsideration of its position, the Fourth Circuit and other courts of appeals would benefit from the opportunity to consider the government's current view. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2017

No. 17-5716

IN THE

Supreme Court of the United States

TIMOTHY KOONS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES FROM THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT

USA v. Timothy Koons, Case No. 15-3794 1

USA v. Randy Feauto, Case No. 15-3854 5

USA v. Kenneth Jay Putensen, Case No. 15-3825 9

USA v. Jose Gardea, Case No. 15-3894 13

USA v. Esequiel Gutierrez, Case No. 15-3880 17

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

USA v. Timothy Koons, Case No. 5:10-cr-04031-MWB 20

USA v. Randy Feauto, Case No. 3:12-cr-03046-MWB 21

USA v. Kenneth Jay Putensen, Case No. 3:07-cr-03008-MWB 29

USA v. Jose Manuel Gardea, Case No. 5:14-cr-04017-MWB 34

USA v. Esequiel Gutierrez, Case No. 5:14-cr-04016-MWB 39

ORDERS AND OPINIONS

Opinion of the United States Court of Appeals for the Eighth Circuit (in re: consolidated cases 15-3794, 15-3825, 15-3854, 15-3880, 15-3894), filed March 10, 2017 44

Memorandum Opinion and Order of the United States District Court for the Northern District of Iowa Regarding Resentencing of Defendant Pursuant to Amendment 782 to the United States Sentencing Guidelines (*USA v. Feauto,* Case No. CR 12-3046), filed November 23, 2015 57

Order of the United States District Court for the Northern District of Iowa, canceling rehearing and denying sentence reduction (as to Defendants Putensen, Koons, Gardea, Gutierrez), dated November 23, 2015 96

Order of the United States Court of Appeals for the Eighth Circuit denying rehearing en banc, dated May 25, 2017 98

TRANSCRIPTS OF SENTENCING HEARINGS IN THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF IOWA (BEFORE HONORABLE MARK W. BENNETT)

USA v. Timothy Koons, Case No. 15-3794, October 15, 2010 101

USA v. Randy Feauto, Case No. 15-3854, June 25, 2013 125

USA v. Kenneth Jay Putensen, Case No. 15-3825, September 25, 2008 157

USA v. Jose Gardea, Case No. 15-3894, July 17, 2014 184

USA v. Esequiel Gutierrez, Case No. 15-3880, July 31, 2014 202

RELEVANT STATUTORY PROVISIONS

United States Code Title 18 § 3553, Imposition of a sentence 221

United States Code Title 28 § 994, Duties of the Commission 229

RELEVANT PROVISIONS OF THE FEDERAL SENTENCING GUIDELINES MANUAL

United States Sentencing Guidelines § 1B1.1..... 242

United States Sentencing Guidelines § 1B1.10..... 244

United States Sentencing Guidelines § 5G1.1 258

Amendment 780..... 259

Amendment 782..... 267

Amendment 788..... 291

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Timothy Koons
Case No. 15-3794

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/08/2015	CRIMINAL case docketed. [4344142] [15-3794] (CAH) [Entered: 12/08/2015 12:22 PM]
01/12/2016	MOTION to consolidate cases 15-3794, 15-3825, 15-3854, 15-3894., filed by Attorney Mr. Joseph Herrold for Appellant Mr. Timothy D. Koons w/service 01/12/2016. [4355030] [15-3794] (JH) [Entered: 01/12/2016 09:14 AM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396] [15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]

04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul, Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]
10/19/2016	ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]
03/10/2017	OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken

	and Duane Benton AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]
03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion.. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510853] [15-3794] (SRD) [Entered: 03/10/2017 10:28 AM]
03/24/2017	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto,

Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Randy Feauto
Case No. 15-3854

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/14/2015	CRIMINAL case docketed. [4346382] [15-3854] (PSA) [Entered: 12/14/2015 03:36 PM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396] [15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]
04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul,

Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]

10/19/2016 ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]

03/10/2017 OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton
AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]

03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510860] [15-3854] (SRD) [Entered: 03/10/2017 10:36 AM]
03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-

3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Kenneth Jay Putensen
Case No. 15-3825

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/10/2015	Originating court document filed consisting of notice of appeal filed 12/7/15, Consent Plea filed 4/4/08, R & R filed 4/4/08, Judgment filed 10/2/08, Orders filed 4/1/15, 6/10-/15, 11/24/15, Memorandum Opinion filed 11/24/15, docket entries, & SEALED documents: Docs-27 & 29 Probation Reports filed 10/9/14 & 4/1/15, Doc 30-Govt. Report filed 4/10/15, Doc 34- Def. Memorandum filed 10/15/15 [4345172] [15-3825] (JMH) [Entered: 12/10/2015 11:24 AM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396]

[15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]

04/29/2016 JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul, Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]

10/19/2016 ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]

03/10/2017	OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]
03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion.. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510857] [15-3825] (SRD) [Entered: 03/10/2017 10:33 AM]
03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons,

Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Jose Gardea
Case No. 15-3894

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/17/2015	CRIMINAL case docketed. [4347800] [15-3894] (PSA) [Entered: 12/17/2015 12:52 PM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396] [15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]
04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul,

Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]

10/19/2016 ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]

03/10/2017 OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton
AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]

03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510864] [15-3894] (SRD) [Entered: 03/10/2017 10:42 AM]
03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-

3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Esequiel Gutierrez
Case No. 15-3880

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/16/2015	CRIMINAL case docketed. [4347269] [15-3880] (PSA) [Entered: 12/16/2015 01:45 PM]
04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul, Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]
10/11/2016	LETTER from Appellant Mr. Esequiel Gutierrez to defer argument time. w/service 10/11/2016 [4457632] [15-3880] (PAW) [Entered: 10/11/2016 04:18 PM]

10/19/2016	ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]
03/10/2017	OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton AUTHORING JUDGE:James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]
03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510862] [15-3880] (SRD) [Entered: 03/10/2017 10:39 AM]

03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for en banc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Timothy Koons
Case No. 5:10-cr-04031-MWB-2

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
05/20/2010	3	Indictment
05/28/2010	6	Information to Establish Prior Conviction
07/20/2010	24	Change of Plea Hearing
10/15/2010	55	Sentencing
10/19/2010	56	Judgment
10/20/2010	57	Sealed Statement of Reasons
03/06/2015	89	Order
04/10/2015	92	Order
06/16/2015	93	Notice (Other)
07/17/2015	96	Sentencing Memorandum
11/24/2015	100	Order
12/07/2015	103	Notice of Appeal – Final Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Randy Feauto
Case No. 3:12-cr-03046-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
09/20/2012	2	SEALED Indictment as to Defendant Randy Feauto (1) on Counts 1, 2, 3 and 4: Voting record in vault (Attachment # 1 Unredacted Version) (USA, eUSM, USP) (kfs) (Entered: 09/21/2012)
10/31/2012	14	INFORMATION to Establish Prior Conviction as to Defendant Randy Feauto (Wehde, Shawn) (Entered: 10/31/2012)
02/22/2013	41	NOTICE of Consent to Entry of a Plea of Guilty and Rule 32 Waiver by Defendant Randy Feauto (des) (Entered: 02/22/2013)
06/25/2013	55	MINUTE Entry for proceedings held before Judge Mark W Bennett: Sentencing held on 06/25/2013 as to Defendant Randy Feauto: Defendant's Exhibits A - D received and previously filed at Docket 53: Defendant detained (Court Reporter: Shelly Semmler) (kfs) (Entered: 06/25/2013)

06/27/2013	56	JUDGMENT as to Defendant Randy Feauto (1). Count(s) 1, 4: Committed to BOP 132 months consisting of 132 months on Count 1 and 132 months on Count 4 of the Indictment, to be served concurrently; Supervised Release 10 years consisting of 10 years on Count 1 and 3 years on Count 4 of the Indictment, to be served concurrently; $200 Assessment. Count(s) 2-3: Dismissed. Signed by Judge Mark W Bennett on 6/27/2013. (des) (Entered: 06/27/2013)
03/06/2015	59	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to Defendant Randy Feauto. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the court's request, the United States Probation Office prepared a memorandum that, among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit

		by no later than 03/26/15 a sealed report that details its position regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 3/6/15.(Copy w/NEF to Def; eFPD) (djs) (Additional attachment(s) added on 3/6/2015: # 1 Confirmation Receipt) (djs). (Entered: 03/06/2015)
04/10/2015	62	ORDER Setting Hearing as to Defendant Randy Feauto regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 7/17/2015 10:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the

hearing, appointed counsel shall represent the defendant, who shall participate by telephone. Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 7/12/2015. The clerk's office shall be directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 4/9/2015. (copy w/NEF mailed to Def, eFPD, eCJA) (des) (Entered: 04/10/2015)

07/17/2015	69	MINUTE Entry for proceedings held before Judge Mark W Bennett: Evidentiary Hearing as to Defendant Randy Feauto held on 7/17/2015 as to Sentence Reduction - USSC Amendment. Court continued this matter for additional briefings by the parties. Court will set up a briefing schedule and send it to the parties. Defendant detained. (Court Reporter Shelly Semmler) (des) (Entered: 07/17/2015)

07/20/2015	70	ORDER re 59 Order Regarding Motion for Sentence Reduction as to Defendant Randy Feauto. As agreed to by the parties at the hearing, Plaintiff's Brief due by 8/28/2015. Defendant's Brief due by 9/17/2015. Plaintiffs Reply Brief due by 9/24/2015. The conclusion of the All Drugs Minus Two Hearing is set for 10/23/2015 10:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. **See text of Order for details.** Signed by Judge Mark W Bennett on 7/20/15. (copy w/nef mailed to defendant; eFPD) (djs) (Additional attachment(s) added on 7/20/2015: # 1 Confirmation Receipt) (djs). (Entered: 07/20/2015)
09/04/2015	73	BRIEF *as Requested by the Court* by USA as to Defendant Randy Feauto re 70 Order (Wehde, Shawn) Modified text on 9/8/2015 (des) (Entered: 09/04/2015)
09/17/2015	74	BRIEF as to Defendant Randy Feauto *(Amicus Curiae Brief)* (Herrold, Joseph) (Entered: 09/17/2015)
09/24/2015	79	MOTION for Leave to File Under Seal by Randy Feauto. (McGough, Jim) (Entered: 09/24/2015)

09/24/2015	80	TEXT ORDER ONLY granting 79 Motion for Leave to File as to Randy Feauto (1). The defendant has permission to file his Reply Brief under seal in this matter. Signed by Judge Mark W Bennett on 9/24/2015. (Gill, Jennifer) (Entered: 09/24/2015)
09/24/2015	82	MOTION for Leave to File Under Seal by Randy Feauto. (McGough, Jim) (Entered: 09/24/2015)
09/24/2015	83	TEXT ORDER ONLY granting 82 Motion for Leave to File as to Randy Feauto (1). The defendant filed Exhibit R under seal in this matter at docket 81 without permission of the court. He now requests permission to file that exhibit under seal. The court grants the motion and Exhibit R shall remain filed under seal at docket 81. (Entered: 09/23/2015) Signed by Judge Mark W Bennett on 9/24/2015. (Gill, Jennifer) (Entered: 09/24/2015)
10/23/2015	84	MINUTE Entry for proceedings held before Judge Mark W Bennett: Evidentiary Hearing as to Defendant Randy Feauto held on 10/23/2015 re All Drugs Minus Two Amendment 782. Sealed Defendant Exhibit R filed at 81.

		Sealed Defendant Exhibits E-Q and S to be filed by attorney Jim McGough by 10/28/2015. Defendant is detained. (Court Reporter Shelly Semmler) (des) (Entered: 10/23/2015)
11/03/2015	86	ORDER Setting Deadline for Response to Court's Tentative Memorandum Opinion and Order Regarding Resentencing as to Defendant Randy Feauto. The parties and amicus curie shall have to and including Wednesday, November 11, 2015, within which to file, under seal, their comments on the tentative ruling. Signed by Judge Mark W Bennett on 11/3/15. (djs) (Entered: 11/03/2015)
11/10/2015	87	SEALED *Comments of Iowa FPD in Response to Court's Proposed Order Addressing Application of Amendment 782* for USA, Daren Schumaker, Pat Korth, US Probation, Randy Feauto as to Defendant Randy Feauto. (Herrold, Joseph) Modified on 11/10/2015 to link to 70. (src) Modified on 11/12/2015 to link to 86. (des) (Entered: 11/10/2015)
11/11/2015	88	MOTION for Leave to File Under Seal by Randy Feauto. (McGough, Jim) (Entered: 11/11/2015)

11/12/2015	90	**TEXT ORDER ONLY** 88 Motion is granted as to Randy Feauto (1). Signed by Judge Mark W Bennett on 11/12/2015. (Mastalir, Roger) (Entered: 11/12/2015)
11/23/2015	92	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Randy Feauto. Signed by Judge Mark W Bennett on 11/23/15. (copy w/nef mailed to defendant) (djs) (Entered: 11/23/2015)
12/03/2015	93	NOTICE of Appeal by Defendant Randy Feauto re 92 Order (McGough, Jim) (Entered: 12/03/2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Kenneth Jay Putensen
Case No. 3:07-cr-03008-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
12/20/2007	1	INDICTMENT as to Kenneth Jay Putensen count 1. Voting record housed in vault. Copies to USM, USP, AUSA, Attny Stoler via CM-ECF. (src) (Additional attachment(s) added on 12/21/2007: # 1 Non Redacted Indictment) (src,). (Entered: 12/21/2007)
03/18/2008	10	INFORMATION TO ESTABLISH PRIOR CONVICTION as to Defendant Kenneth Jay Putensen (Fletcher, Kevin) (Entered: 03/18/2008)
04/04/2008	14	Sealed Minute Entry for proceedings held before Chief Magistrate Paul A Zoss. (Digital Recording.) (ak) (Additional attachment(s) added on 4/4/2008: # 1 Sealed Document) (ak). Modified on 4/15/2008 Copies to USA, USM, USP, Defense Attorney, (ak). (Entered: 04/04/2008)

10/02/2008	22	JUDGMENT as to Defendant Kenneth Jay Putensen, Count 1, Defendant committed to BOP for 264 months - Supervised Release for 10 years - Special Assessment fee of $100.00. Signed by Judge Mark W Bennett on 10/02/08. (src) (Entered: 10/02/2008)
04/01/2015	28	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to Defendant Kenneth Jay Putensen. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the courts request, the United States Probation Office prepared a memorandum that, among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit by no later than 04/10/15 a sealed report that details its position regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that

		responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 4/1/15. (Copy w/NEF to Def; eFPD) (djs) (Entered: 04/01/2015)
06/10/2015	31	ORDER as to Defendant Kenneth Jay Putensen regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 08/20/2015 at 9:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the hearing, appointed counsel shall represent the defendant, who shall participate by telephone. Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 08/15/2015. The clerk's office shall be directed to send a

		copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 6/10/2015. (Copy w/NEF to Def) (des) (Entered: 06/11/2015)
06/16/2015	32	NOTICE *Regarding Resentencing* by USA as to Defendant Kenneth Jay Putensen re 31 Order (Wehde, Shawn) Modified text on 6/17/2015 (djs). (Entered: 06/16/2015)
10/16/2015	34	SEALED Sentencing Memorandum By Defendant *in support of sentence reduction under 18 U.S.C. § 3582(c) and retroactive amendments to the drug sentencing guidelines* as to Defendant Kenneth Jay Putensen (Herrold, Joseph) (Entered: 10/16/2015)
11/24/2015	38	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Kenneth Jay Putensen. The resentencing hearing currently scheduled for 12/21/2015 is cancelled. Signed by Judge Mark W Bennett on 11/23/2015. (Attachments: # 1 CR12-3046-MWB Memorandum

		Opinion and Order) (copy w/nef mailed to defendant) (des) (Entered: 11/24/2015)
12/07/2015	39	NOTICE of Appeal by Defendant Kenneth Jay Putensen re 38 Order (Herrold, Joseph) Modified text on 12/7/2015 (djs). (Entered: 12/07/2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Jose Manuel Gardea
Case No. 5:14-cr-04017-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
02/20/2014	2	INDICTMENT as to Jose Manuel Gardea (1) count(s) 1, 2. Voting record in vault. (Attachments: # 1 Unredacted) (des) (Entered: 02/20/2014)
04/21/2014	25	MINUTE Entry for proceedings held before Magistrate Judge Leonard T Strand: Change of Plea Hearing as to Defendant Jose Manuel Gardea held on 4/21/2014. Defendant pleaded guilty to count 1 of the Indictment. Count 2 will be dismissed at the time of sentencing. Defendant detained. Sealed Hearing Exhibit due by 4/24/2014. (FTR Gold) (des) (Entered: 04/21/2014)
07/17/2014	36	MINUTE Entry for proceedings held before Judge Mark W Bennett: Sentencing held on 7/17/2014 as to defendant Jose Manuel Gardea. Defendant is detained. (Court Reporter - Shelly

		Semmler) (src) (Entered: 07/17/2014)
07/17/2014	37	JUDGMENT as to Defendant Jose Manuel Gardea (1): Count 1: Defendant committed to BOP for 84 months: Defendant on supervised release for 96 months: $100 special assessment: Count 2: Dismissed. Signed by Judge Mark W Bennett on 07/17/14. (kfs) (Entered: 07/17/2014)
04/01/2015	39	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to defendant Jose Manuel Gardea. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the courts request, the United States Probation Office prepared a memorandum that, among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit by no later than 04/10/15 a sealed report that details its position regarding a

		reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 04/01/2015.(Copy w/NEF to Def at Oklahoma City Federal Transfer Center; eFPD) (src) (Entered: 04/01/2015)
06/10/2015	42	ORDER as to Defendant Jose Manuel Gardea regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 08/20/15 at 11:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the hearing, appointed counsel shall represent the defendant, who shall participate by telephone.

		Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 08/15/15. The clerk's office shall be directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 6/10/15. (Copy w/NEF to Def; eFPD, eCJA) (djs) (Entered: 06/10/2015)
06/16/2015	43	NOTICE *Government's Memorandum Regarding Resentencing* by USA as to Defendant Jose Manuel Gardea re 42 Order. (Wehde, Shawn) Modified text on 6/17/2015 (skm). (Entered: 06/16/2015)
10/23/2015	45	SEALED Sentencing Memorandum By Defendant *in Support of Sentence Reduction Under 18 U.S.C. § 3582(c) and Retroactive Amendments to Drug Sentencing Guidelines* as to Defendant Jose Manuel Gardea (Herrold, Joseph) (Entered: 10/23/2015)

11/24/2015	48	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Jose Manuel Gardea. The resentencing hearing currently scheduled for 12/21/2015 is cancelled. Signed by Judge Mark W Bennett on 11/23/2015. (Attachments: # 1 CR12-3046-MWB Memorandum Opinion and Order) (copy w/nef mailed to defendant) (des) (Entered: 11/24/2015)
12/07/2015	49	NOTICE of Appeal - Interlocutory by Defendant Jose Manuel Gardea re 48 Order. (Herrold, Joseph) Modified text on 12/8/2015 (skm). (Entered: 12/07/2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Esequiel Gutierrez
Case No. 5:14-cr-04016-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
02/19/2014	2	INDICTMENT as to Esequiel Gutierrez (1) count(s) 1, 2. Voting record in vault. (Attachments: # 1 Unredacted) (des) (Entered: 02/19/2014)
02/20/2014	5	SUPERSEDING Indictment as to Esequiel Gutierrez (1) count(s) 1s. Voting record in vault. (Attachments: # 1 Unredacted) (des) (Entered: 02/20/2014)
05/06/2014	23	MINUTE Entry for proceedings held before Magistrate Judge Leonard T Strand: Change of Plea Hearing as to Defendant Esequiel Gutierrez held on 5/6/2014. Defendant pleaded guilty to count 1 of the Superseding Indictment. Sealed Exhibit filed at 21. Defendant detained. (FTR Gold) (des) (Entered: 05/06/2014)
07/31/2014	35	MINUTE Entry for proceedings held before Judge Mark W Bennett: Sentencing held on

		07/31/2014 as to Defendant Esequiel Gutierrez: Defendant detained: Defense Exhibits A and B (previously filed at Docket 33 and 34) admitted (Court Reporter: Shelly Semmler) (kfs) (Entered: 07/31/2014)
07/31/2014	36	JUDGMENT as to Defendant Esequiel Gutierrez (1): Counts 1 and 2: Dismissed; Count 1s: Defendant committed to BOP for 192 months: Defendant on supervised release for 120 months: $100 special assessment. Signed by Judge Mark W Bennett on 07/31/14. (kfs) (Entered: 07/31/2014)
07/31/2014	37	SEALED Statement of Reasons by USA, Jill Freese, US Probation, Esequiel Gutierrez as to Defendant Esequiel Gutierrez (kfs) (Entered: 07/31/2014)
04/01/2015	39	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to Defendant Esequiel Gutierrez. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the courts request, the United States Probation Office prepared a memorandum that,

		among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit by no later than 04/10/15 a sealed report that details its position regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 4/1/2015. (copy w/nef to Def; eFPD) (des) (Entered: 04/01/2015)
06/10/2015	42	ORDER as to Defendant Esequiel Gutierrez regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 08/20/15 at 1:30 PM in SC 3rd Fl

Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the hearing, appointed counsel shall represent the defendant, who shall participate by telephone. Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 08/15/15. The clerk's office shall be directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 6/10/15. (Copy w/NEF to Def; eFPD, eCJA) (djs) (Entered: 06/10/2015)

06/16/2015 43 NOTICE *Regarding Resentencing* by USA as to Defendant Esequiel Gutierrez re 42 Order (Wehde, Shawn) Modified text on 6/17/2015 (des) (Entered: 06/16/2015)

11/24/2015	46	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Esequiel Gutierrez. The resentencing hearing currently scheduled for 12/21/2015 is cancelled. Signed by Judge Mark W Bennett on 11/23/2015. (Attachments: # 1 CR12-3046-MWB Memorandum Opinion and Order) (copy w/nef mailed to defendant) (des) (Entered: 11/24/2015)
12/04/2015	47	NOTICE of Appeal by Defendant Esequiel Gutierrez re 46 Order Denying Sentence Reduction - USSC Amendment (Wingert, Pamela) Modified text on 12/7/2015 (des) (Entered: 12/04/2015)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-3794

United States of America
Plaintiff-Appellee

v.

Timothy D. Koons
Defendant – Appellant

No. 15-3825

United States of America
Plaintiff-Appellee

v.

Kenneth Jay Putensen
Defendant-Appellant

No. 15-3854

United States of America
Plaintiff-Appellee

v.

Randy Feauto
Defendant-Appellant

No. 15-3880

United States of America

Plaintiff-Appellee

v.

Esequiel Gutierrez

Defendant-Appellant

No. 15-3894

United States of America

Plaintiff-Appellee

v.

Jose Manuel Gardea

Defendant-Appellant

Appeals from United States District Court for the Northern District of Iowa – Sioux City

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Submitted: October 19, 2016
Filed: March 10, 2017

Before WOLLMAN, LOKEN, and BENTON, Circuit Judges.

LOKEN, Circuit Judge.

In these consolidated appeals, five defendants convicted of methamphetamine conspiracy offenses appeal denial of their motions for sentence reductions under 18 U.S.C. § 3582(c)(2). For all five, the initial advisory guidelines range was entirely below the statutory mandatory minimum, and each was sentenced below that minimum after the district court granted government motions for § 3553(e) substantial assistance departures. The question is whether § 3582(c)(2) relief is now available because Amendment 782 to the Guidelines retroactively reduced by two levels the base offense levels assigned to drug quantities, lowering the advisory guidelines range for most drug offenses. We conclude that these defendants are not eligible for a § 3582(c)(2) reduction because their sentences were not "based on" a guidelines range subsequently lowered by the Sentencing Commission. Thus, we affirm the district court's denial of sentencing reductions on a different ground.

I.

In November 2012, Randy Feauto pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine and unlawful possession of a firearm. Feauto's advisory guidelines range was 168 to 210 months in prison, but the conspiracy offense mandated a statutory minimum 20-year sentence, which became his guidelines sentence under U.S.S.G. § 5G1.1(b). The government moved for a substantial assistance downward departure. See 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1. The government recommended a ten percent reduction because Feauto had continued dealing drugs while assisting law enforcement by making controlled buys from drug

dealers. The district court imposed a 132-month sentence, 45 percent below the mandatory minimum.

After Amendment 782 became effective on November 1, 2014, the district court initiated a § 3582(c)(2) proceeding to determine whether Feauto was eligible for a sentence reduction. The United States Probation Office calculated his amended guidelines range to be 121 to 151 months in prison, disregarding § 5G1.1 of the Guidelines, as U.S.S.G. § 1B1.10(c) instructs. Promulgated by the Commission in Amendment 780, § 1B1.10(c) provides, with emphasis added:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance. If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the *amended guideline range shall be determined without regard to the operation of § 5G1.1* (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

This appeared to make Feauto eligible for discretionary § 3582(c)(2) relief that could reduce his sentence to as low as 67 months, a reduction comparable to the initial 45 percent substantial assistance reduction. *See* U.S.S.G. § 1B1.10, cmt. n.4.

At the § 3582(c)(2) motion hearing, the district court commented, "I don't see how a retroactive

guideline can essentially trump a mandatory minimum like it does in this case," and ordered briefing on the issue. The government and Feauto agreed he was eligible for a reduction, but disagreed as to whether the district court should exercise its discretion to reduce his sentence. After giving the parties an opportunity to comment on its tentative decision, the court ruled that the Sentencing Commission exceeded its authority in promulgating a guideline, § 1B1.10(c), that nullifies the statutory minimum sentence, or that Congress violated the non-delegation doctrine and separation-of-powers principles if it granted that authority. Accordingly, the district court concluded, Feauto was not eligible for § 3582(c)(2) relief because he "was subject to a mandatory minimum sentence exceeding both his original guideline range and his amended guideline range." *United States v. Feauto*, 146 F. Supp. 3d 1022, 1041 (N.D. Iowa 2015). This decision was consistent with controlling Eighth Circuit precedent prior to the adoption of § 1B1.10(c) in November 2014. *See United States v. Moore*, 734 F.3d 836, 838 (8th Cir. 2013).

The other four appellants were likewise convicted of drug conspiracy offenses mandating statutory minimum sentences greater than their entire advisory guidelines ranges — Timothy Koons (20-year mandatory minimum), Kenneth Jay Putensen (life), Jose Gardea (10 years), and Esequiel Gutierrez (20 years). Each was granted a substantial assistance reduction below the mandatory minimum sentence — Koons to 180 months (25 percent); Putensen to 264 months (35 percent); Gardea to 84 months (30 percent); and Gutierrez to 192 months (36 percent). Amendment 782 lowered their amended guidelines

ranges further below the mandatory minimum, calculated in accordance with § 1B1.10(c). The district court denied § 3582(c)(2) sentencing reductions, relying on its ruling in *Feauto*. These appeals followed. We review defendants' eligibility for § 3582(c)(2) sentence reductions *de novo*. *United States v. Bogdan*, 835 F.3d 805, 807 (8th Cir. 2016).

II.

Providing a rare exception to the finality of criminal judgments, § 3582(c)(2) allows a district court to reduce the sentence of "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The applicable policy statement, U.S.S.G. § 1B1.10, provides that a defendant is eligible for a discretionary § 3582(c)(2) reduction if his applicable guidelines range is lowered by a retroactive amendment listed in § 1B1.10(d), such as Amendment 782. *See* U.S.S.G. § 1B1.10(a). The extent of a § 3582(c)(2) reduction is normally limited to the bottom of the amended guidelines range, but if the defendant initially received a sentence below the initial guidelines range by reason of a substantial assistance reduction, "a reduction comparably less than the amended guideline range . . . may be appropriate." § 1B1.10(b)(2)(B).

For a defendant to be eligible for § 3582(c)(2) relief under U.S.S.G. § 1B1.10(a), Amendment 782 must lower his applicable guideline range. A conflict in the circuits developed regarding how to determine eligibility when the applicable guidelines range is

affected by a mandatory minimum sentence. Some circuits held that a retroactive amendment did not have the effect of lowering the defendant's applicable guidelines range because, by reason of § 5G1.1(b), the amended and original range were both determined by the mandatory minimum. *See, e.g.*, *United States v. Joiner*, 727 F.3d 601, 608-09 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1357 (2014); *United States v. Johnson*, 732 F.3d 109, 114-15 (2d Cir. 2013); *United States v. Baylor*, 556 F.3d 672, 673 (8th Cir. 2009). In promulgating § 1B1.10(c), the Commission explained that "circuits are split over what to use as the bottom of the [amended] range." The Commission "generally adopt[ed]" the approach of the Third Circuit and the D.C. Circuit — when a defendant's initial guidelines range was entirely below the mandatory minimum, "the bottom of the amended range [is] . . . the bottom of the Sentencing Table guideline range," disregarding § 5G1.1(b). U.S.S.G. App. C, Amend. 780, at 56 (Supp. 2015), citing *United States v. Savani*, 733 F.3d 56, 66-67 (3d Cir. 2013), and *In re Sealed Case*, 722 F.3d 361, 369-70 (D.C. Cir. 2013).[1] The government's interpretation of § 1B1.10(c) makes defendants eligible for § 3582(c)(2) reductions, contrary to our controlling prior precedents. *See Moore*, 734 F.3d at 838; *Baylor*,

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[1] In deciding these appeals, we accept the Commission's resolution of conflicting judicial interpretations of the term "applicable guideline range" in U.S.S.G. § 1B1.10(a). "[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation" provided it does not violate the Constitution or a federal statute and is not plainly erroneous. *Stinson v. United States*, 508 U.S. 36, 46 (1993). The district court concluded that § 1B1.10(c) is constitutionally flawed, an issue we do not address.

556 F.3d at 673. On appeal, the government argues that § 1B1.10(c) requires us to reexamine these precedents and urges us to follow the Fourth Circuit panel majority in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015). Defendants are eligible for discretionary § 3582(c)(2) reductions, the government argues, because § 3582(c)(2) authorizes a reduction based on a defendant's substantial assistance if it is "consistent with applicable policy statements issued by the Sentencing Commission."

As we noted in *Bogdan*, 835 F.3d at 807, the government, like the Commission, ignores a critical "threshold question" raised by the plain language of § 3582(c)(2), namely, whether each defendant was sentenced "*based on* a sentencing range that has subsequently been lowered by the Sentencing Commission." § 3582(c)(2) (emphasis added); see *Dillon v. United States*, 560 U.S. 817, 821 (2010). Like the defendants in this case, Joseph Bogdan's guidelines range was entirely below the mandatory minimum, and he received an initial sentence below the mandatory minimum for his substantial assistance. We did not answer this threshold question in *Bogdan* because that case turned on the application of the Supreme Court's decision in *Freeman v. United States*, 564 U.S. 522 (2011), to defendant *Bogdan*'s Rule 11(c)(1)(C) plea agreement. But we were "inclined to agree with Fourth Circuit Chief Judge William Traxler that, in this situation, the sentence would not be based on a range the Sentencing Commission subsequently lowered, 'because it was not based on a *sentencing range* in the first instance.'" *Id.* at 808, quoting *Williams*, 808 F.3d at 264 (Traxler, C.J., dissenting). "The more logical interpretation would be

that the [term of imprisonment] was based on the mandatory minimum, not on a guidelines range." *Bogdan*, 835 F.3d at 809.

With the issue now fully briefed and argued, we adhere to our tentative conclusion in *Bogdan*. When the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point. *See United States v. Billue*, 576 F.3d 898, 904-05 (8th Cir.), *cert. denied*, 558 U.S. 1058 (2009). Any "reduction below the statutory minimum must be based exclusively on assistance-related considerations." *United States v. Williams*, 474 F.3d 1130, 1131 (8th Cir. 2007); *see Feauto*, 146 F. Supp. 3d at 1036, 1039. In these cases, each defendant's prison term was "based on" his statutory mandatory minimum sentence and his substantial assistance. The guidelines range "artificially established by § 5G1.1(b)" depended upon the mandatory minimum. *Bogdan*, 835 F.3d at 809. If § 5G1.1(b) did not exist, the district court would still have set these defendants' sentences at the mandatory minimum before considering a substantial assistance departure. And if initially sentenced today with Amendment 782 in effect, the defendants would be "stuck with that mandatory minimum sentence as a 'starting point' for any substantial assistance reduction." *Feauto*, 146 F. Supp. 3d at 1037. "In essence, the advisory sentencing range became irrelevant." *Williams*, 808 F.3d at 264 (Traxler, C.J., dissenting).

We respectfully decline to follow the Fourth Circuit panel majority in *Williams*. *In United States v. Hood*, 556 F.3d 226 (4th Cir.), *cert. denied*, 558 U.S. 921 (2009), an earlier Fourth Circuit panel concluded: "Because Hood's 240-month Guidelines sentence was based on a statutory minimum and U.S.S.G. § 5G1.1(b), it was not *based on* a sentencing range lowered by Amendment 706, and at this point in the analysis, Hood would not be eligible for a reduced sentence under § 3582(c)(2)." *Hood*, 556 F.3d at 233. Likewise, in *Moore*, 734 F.3d at 838, we held that "Moore's sentence was based on a statutory mandatory minimum term of imprisonment. Accordingly, Amendment 750 does not apply . . . and Moore is not eligible for relief under section 3582(c)(2)." Then-Chief Judge Traxler's dissent in *Williams* specifically relied on *Hood*'s statutory "based on" analysis, 808 F.3d at 265-66, yet the Williams majority concluded that Hood was simply "inapplicable" after Amendment 780, ignoring altogether that "based on" is a statutory prerequisite of § 3582(c)(2) eligibility, *id.* at 261.

The Commission in Amendment 780 also ignored this "based on" statutory requirement, despite numerous circuit court decisions such as *Hood* and Moore that had considered this a critical, if not determinative, issue. For example, in "generally" adopting the Third Circuit and D.C. Circuit "approach," the Commission did not acknowledge the D.C. Circuit's analysis of the "based on" requirement in *In re Sealed Case*, 722 F.3d at 365-66, nor the fact that the Third Circuit in *Savani*, 733 F.3d at 67, after concluding that "applicable guideline range" in § 1B1.10(a)(2)(B) was ambiguous and should be construed in favor of the defendants under the Rule of

Lenity, remanded for consideration of whether defendants' sentences were "based on" a guidelines range in light of *Freeman*. *See also United States v. Glover*, 686 F.3d 1203, 1208 (11th Cir. 2012).

The Commission's failure to consider the meaning of the term "based on" in § 3582(c)(2) is especially perplexing given the Supreme Court's recent decision in *Freeman*. That case turned on whether a defendant who was sentenced in accordance with a Rule 11(c)(1)(C) plea agreement was *ineligible* for a § 3582(c)(2) reduction because his sentence was "based on" the plea agreement, rather than on a lowered sentencing range. Five Justices held that the sentence was based on the plea agreement. *See* 564 U.S. at 535 (Sotomayor, J., concurring), 545 (Roberts, C.J., dissenting). The dissenters acknowledged that a defendant's sentence is "based on" a guidelines range when his Rule 11(c)(1)(C) plea agreement "expressly provid[ed] that the court will sentence the defendant within an applicable Guidelines range." *Id.* at 546. Justice Sotomayor concurred in the result, concluding the defendant is also eligible for relief if the plea agreement "make[s] clear that the basis for the specified [prison] term is [an applicable] Guidelines sentencing range." *Id.* at 539. The plurality, in the minority on this issue, concluded that the sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement is "based on" the applicable guidelines range considered by the district court in accepting the agreement. *Id.* a 529.

The reasoning *of all nine Justices* in Freeman required a greater substantive relationship between the plea agreement and a guidelines range than the

fictional relationship between a mandatory minimum sentence required by statute and a guidelines "range" determined by § 5G1.1(b). A § 5G1.1(b) artificial range in no substantive way "serves as the basis or foundation for the term of imprisonment." *Id.* at 535 (Sotomayor, concurring). Justice Sotomayor's concurring opinion controls in construing Freeman. *See United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1616 (2013). But all nine Justices construed the term "based on" as imposing a substantive limitation on § 3582(c)(2) relief, a limitation inconsistent with the examples discussed by the Commission in Amendment 780, and with the result reached by the Fourth Circuit majority in *Williams*.

Congress has declared that the Commission's guidelines and policy statements shall "establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." 28 U.S.C. § 994(b)(1). But the Commission's interpretation of § 3582(c)(2) ignores the statute's plain text as construed in *Freeman* — defendants' sentences were "based on" the mandatory minimum and their substantial assistance, not on "a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Once the Supreme Court determines the meaning of a statute, courts "assess an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996). "[T]he Commission does not have the authority to amend [a] statute" the Supreme Court has construed. Id. at 290; see United States v. Stoneking, 60 F.3d 399, 402 (8th Cir. 1995) (en banc). "If the Commission's revised commentary is

at odds with [§ 3582(c)(2)'s] plain language, it must give way." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Nor can "the Sentencing Commission . . . overrule circuit precedent interpreting a *statutory* provision." *Williams*, 808 F.3d at 266 (Traxler, C.J., dissenting).[2]

For these reasons, we conclude that the defendants are ineligible for § 3582(c)(2) sentencing reductions because their initial sentences were not "based on" a guidelines range lowered by Amendment 782. *Accord United States v. C.D.*, No. 15-3318+, 2017 WL 694483 (10th Cir. Feb. 22, 2017). Accordingly, the district court orders denying § 3582(c)(2) reductions are affirmed.

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[2] The original Commentary to § 5G1.1 stated, more plainly than the amended version, "[i]f the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control." U.S.S.G. App. C, Vol. 1, Amend. 286.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES of America, Plaintiff, v. Randy FEAUTO, Defendant.	No. CR 12–3046 [November 23, 2015]

MEMORANDUM OPINION AND ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES

MARK W. BENNETT, UNITED STATES DISTRICT COURT JUDGE, NORTHERN DISTRICT OF IOWA.

* * *

I. INTRODUCTION

A. Foreword

Before me for consideration is defendant Randy Feauto's eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) in light of Amendment 782, the "All Drugs Minus Two Amendment," to the United States Sentencing Guidelines.[1] The parties and the Federal

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[1] In an Indictment (docket no. 2), handed down September 20, 2012, defendant Randy Feauto was charged with four offenses. **Count 1** charged Feauto with conspiracy to manufacture and distribute 50 grams or more of actual (pure) methamphetamine, after a prior conviction for delivery of a simulated controlled

Defender for the Northern and Southern Districts of Iowa, as invited *amicus curie*, argue that a defendant subject to a mandatory minimum sentence who previously received a "substantial assistance" reduction below that mandatory minimum can be

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substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851. **Counts 2** and **3** charged Feauto with separate counts of distributing detectable amounts of actual (pure) methamphetamine, after a prior conviction for delivery of a simulated controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 851. **Count 4** charged Feauto with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Eventually, on February 22, 2013, Feauto pleaded guilty, before a United States Magistrate Judge, to **Counts 1** and **4** of the Indictment, pursuant to a plea agreement providing for dismissal of **Counts 2** and **3** at sentencing *See* Minutes of Plea Hearing (docket no. 42); Report And Recommendation Concerning Plea of Guilty (docket no. 43). I accepted Feauto's guilty plea by Order (docket no. 47), filed February 22, 2013. At Feauto's sentencing hearing on June 25, 2013, I concluded that Feauto's Base Offense Level, based on at least 50 but less than 150 grams of actual (pure) methamphetamine, was 32; that his Total Offense Level was 33, with a 2–level increase for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, and a 3–level reduction for acceptance of responsibility, pursuant to U.S.S.G. §§ 3E1.1(a) and 3E1.1(b); that his criminal history category was III; and that his advisory guideline sentencing range was 168 to 210 months. However, I also concluded that Feauto's advisory guideline sentencing range was "trumped" by his mandatory minimum sentence of 240 months, pursuant to U.S.S.G. § 5G1.2(b). I then granted the prosecution's motion to reduce Feauto's sentence for "substantial assistance," pursuant to both U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), and imposed a sentence of 132 months, which amounted to a 45% reduction from Feauto's mandatory minimum sentence. *See* Minutes of Sentencing Hearing (docket no. 55); Judgment (docket no. 56); Statement of Reasons (docket no. 57).

resentenced pursuant to Amendment 782 without regard to the mandatory minimum. That position was originally music to my ears, because I have consistently—and vehemently—disagreed with the harshness of most mandatory minimum sentences.[2] In

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[2] Law review articles: Mark W, Bennett, *Slow Motion Lynching? The War on Drugs and Mass Incarceration: Reflections on Doing Kimbrough Justice and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873 (2014); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?": America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUSTICE 117 (2014): Media interviews: Eli Saslow, *Against His Better Judgment*, WASH. POST, June 7, 2015, at A01, 2015 WLNR 16811322; *Why Mandatory Minimum Sentences on Drug Arrests are "Unfair and Racist,"* HUFFPOST LIVE (May 6, 2014), http://huffingtonpost.com/r/highlight/ mandatory-minimum-sentences-are-unfairandracist/53694529fe34448f9c0006dc; *The Brief*, an Irish radio program podcast worldwide, led by barrister Andrew Robinson. Telephonic interview about mass incarceration and mandatory minimum sentencing in America, July 18, 2013; *The Melissa Harris–Perry Show* (MSNBC television broadcast Nov. 18, 2012); Documentary: THE HOUSE I LIVE IN (ZDF/ITVS/BBC 2012) Eugene Jarecki, director) (Official Selection and Winner, Grand Jury Prize, Sundance Film Festival 2012); Letters to the editor: Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, THE NATION, Nov. 12, 2012, at 4; Mark W. Bennett & Mark Osler, *The Wrong People Decide Who Goes to Prison*, CNN (Dec. 3, 2013, 7:49 AM), http://www.cnn.com/2013/12/03/opinion/bennett-osler sentencing index.html?hpt=hp t4; Mark W. Bennett & Mark Osler, *Op–Ed., America's Mass Incarceration: The Hidden Costs*, MINNEAPOLIS STAR TRIBUNE, June 28, 2013, at A11; Judicial opinions: *United States v. Young*, 960 F.Supp. 2d 881, 882 (N.D. Iowa 2013) ("This case presents a deeply disturbing, yet often replayed, shocking, dirty little secret of federal sentencing: the stunningly arbitrary application by the Department of Justice (DOJ) of § 851 drug sentencing enhancements."); *United States v. Hayes*, 948 F.Supp. 2d 1009, 1026 (N.D. Iowa 2013) ("In *United States v. Newhouse*,

fact, in most of the over 1,000 congressionally-mandated mandatory minimum sentences that I have imposed over the past twenty-two years, I have stated on the record that they were unjust and too harsh. I would often inform or remind defendants and their families and supporters in the courtroom that reform of mandatory minimum sentencing must come from the legislative branch of our federal government—Congress. So it is with significant irony, but consistent with my view that only Congress has the authority to waive mandatory minimum sentences (with the exception of substantial assistance motions, pursuant to § 3553(e) and FED. R. CRIM. P. 35(b), and "safety valve" eligibility, pursuant to § 3553(f)), that I disagree with the parties' argument that the Sentencing Commission has the authority to use Amendment 782, or any other amendment to the Sentencing Guidelines, to "nullify" a mandatory minimum sentence established by Congress.

For the reasons set forth below, my understanding is that only Congress itself, not the Sentencing Commission or the Judicial Branch, has that power. Consequently, the proper net effect of Amendment 782, applied either retroactively or prospectively, is

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919 F.Supp. 2d 955 (N.D. Iowa 2013), I questioned whether there is a factual or logical basis for a relatively low amount of methamphetamine to trigger a five-year mandatory minimum."); *United States v. Williams*, 788 F.Supp. 2d 847 (N.D. Iowa 2011) (noting the lack of any rationale for the 18:1 crack-to-powder cocaine ratio under the Fair Sentencing Act, other than compromise, its continuation of the disparities between quantities of crack and powder cocaine that invoke mandatory minimum sentences, and reiterating my adoption of a 1:1 ratio for guideline sentence determinations).

that it can only reduce the sentence of a defendant who originally received a reduction for substantial assistance if he had no mandatory minimum or both his original guideline sentence and his amended guideline sentence are above his mandatory minimum. Feauto is not such a defendant. I fully recognize that, like the vast majority of mandatory minimum sentences themselves, this construction leads to a harsh result, but fidelity to the rule of law and principles of non-delegation and separation of powers trumps any personal views on the harshness of federal sentencing. As discussed below, the construction urged by the parties and *amicus* creates an Alice In Wonderland like scenario in which the retroactive application of Amendment 782 opens a rabbit hole that Feauto, instead of Alice, falls through and receives a lower sentence in Wonderland than if he were originally sentenced today for his crime with the application of post-Amendment 782. Surely, this Mad Tea Party scenario creates the very kind of unwarranted disparity the guidelines were intended to avoid.

B. Resentencing Under Amendment 782

1. Proceedings in this case

Consideration of whether or not defendant Feauto is eligible for a reduction in sentence pursuant to Amendment 782 began in March 2015. At the conclusion of Feauto's "All Drugs Minus Two" hearing on October 23, 2015,[3] I informed the parties that I

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[3] On March 6, 2015, I entered an Order (docket no. 59), *sua sponte*, after reviewing a memorandum (docket no. 60) prepared by the United States Probation Office on Feauto's eligibility for a

would issue a *tentative* opinion for their comment within the next few weeks, before issuing a final opinion. I provided the parties with such a tentative opinion on November 3, 2015. The prosecution and the Federal Defender submitted their comments on November 11, 2015, *see* docket nos. 87 and 89, respectively, and defendant Feauto submitted his

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sentence reduction under 18 U.S.C. § 3582(c)(2) and calculation of his amended guideline range in light of Amendment 782 to the United States Sentencing Guidelines. In that Order, I directed the prosecution to submit a sealed report detailing its position regarding a sentence reduction for Feauto pursuant to 18 U.S.C. § 3582(c)(2). The prosecution filed the required Report (docket no. 61), on March 25, 2015, asserting that no reduction of Feauto's sentence was appropriate, but requested a hearing on the issue. I entered an Order (docket no. 62), on April 10, 2015, setting a hearing on Feauto's eligibility for a sentencing reduction for July 17, 2015, and directed the Clerk of Court to appoint counsel to represent Feauto.

I held an initial hearing on Feauto's eligibility for a sentence reduction on July 17, 2015, but continued the matter for additional briefing by the parties. *See* Minutes Of Hearing on July 17, 2015 (docket no. 69). On July 20, 2015, I entered an Order (docket no. 70) in which I set a briefing schedule on the issue of the proper method for applying retroactive Amendment 782 to the United States Sentencing Guidelines where a mandatory minimum and a substantial assistance departure were both involved in the original sentencing. I also required the defendant to give notice to the Federal Defender, so that the Federal Defender could file an *amicus curie* brief, because my decision might affect many defendants represented by the Federal Defender. I also set the conclusion of Feauto's "All Drugs Minus Two" hearing for October 23, 2015. The prosecution filed its Brief (docket no. 73), on September 4, 2015; the Federal Defender filed its *Amicus Curiae* Brief (docket no. 74), on September 17, 2015; and Feauto filed his Reply Brief (docket no. 81), on September 24, 2015.

comments on November 12, 2015. *See* docket no. 91. This Memorandum Opinion And Order is my final opinion on the matter, which has taken into consideration the parties' original arguments and their comments on my tentative opinion.

2. Resentencing authority

To put the present discussion in context, I will summarize the authority of a court to resentence a defendant in light of subsequent amendments to the Sentencing Guidelines. Congress has provided, *inter alia*, that "[t]he [Sentencing] Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. § 994(*o*). Congress has also provided authority to reduce a sentence in light of such revisions to the Sentencing Guidelines in 18 U.S.C. § 3582(c). Specifically, § 3582(c)(2) provides, in pertinent part, as follows:

> **(c) Modification of an imposed term of imprisonment.**—The court may not modify a term of imprisonment once it has been imposed except that—
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> * * *
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> **(2)** in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after

> considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). "The Supreme Court has indicated that a sentence reduction under § 3582(c)(2) is not a 'plenary resentencing'; rather, it operates as 'a narrow exception to the rule of finality' that 'permits a sentence reduction within the narrow bounds established by the Commission.' " *United States v. Anderson,* 686 F.3d 585, 589 (8th Cir. 2012) (quoting *Dillon v. United States,* 560 U.S. 817, 827, 831 (2010)).

3. The pertinent guidelines and policy statements

The pertinent guideline revision here, triggering the possibility of a sentence reduction pursuant to § 3582(c)(2), is Amendment 782 to the Sentencing Guidelines, in which the Sentencing Commission lowered the sentencing range for drug offenders. Amendment 782 became effective November 1, 2014, and was made retroactive effective November 1, 2015. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment; *United States v. Lawin,* 779 F.3d 780, 781 n. 2 (8th Cir. 2015); *United States v. Thomas,* 775 F.3d 982, 983 (8th Cir. 2014) ("[T]he Commission expressly made Amendment 782 retroactive (effective November 1, 2015)."). Essentially, Amendment 782 "applies retroactively to reduce most drug quantity base offense levels by two levels." *United States v. Lawin,* 779 F.3d 780, 781 n. 2 (8th Cir. 2015) (citing *Thomas,* 775 F.3d at 982). As the

Eighth Circuit Court of Appeals has pointed out, "Amendment 782 amended [U.S.S.G.] § 2D1.1," that is, it amended sentencing ranges determined by drug quantity, but it did not lower the sentencing ranges established on the basis of other offense or offender characteristics, such as "career offender" status under U.S.S.G. § 4B1.1. *Thomas,* 775 F.3d at 983. The Sentencing Commission, itself, expressly stated that the purpose of Amendment 782 was to "change[ ] how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties," and that it served this purpose by "reduc[ing] by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, *resulting in corresponding guideline ranges that include the mandatory minimum penalties.*" UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment (emphasis added) (quoted more extensively in footnote 4).[4] Amendment 782 does

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[4] As the Sentencing Commission explained, more fully,

> This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. *See* 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code"); *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").
>
> Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the

absolutely nothing to reduce the drug quantity that triggers a mandatory minimum.

U.S.S.G. § 1B1.10 is the Sentencing Commission's policy statement concerning reduction in a defendant's term of imprisonment as a result of an amended guideline range, *i.e.*, the companion provision under the Sentencing Guidelines to statutory § 3582(c)(2). As the parties and *amicus* note, this Guideline, as amended to implement Amendment 782, provides as follows:

> (c) *Cases Involving Mandatory Minimum Sentences and Substantial Assistance.*—If

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> statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.
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> UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment.

> the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

U.S.S.G. § 1B1.10(c). In other words, by making § 5G1.1 and § 5G1.2 "inoperative" in specific cases, this policy statement eliminates the guideline provisions that would make the mandatory minimum the guideline sentence, when the mandatory minimum is above the guideline range. The pertinent Application Note explains, further, that the amended sentence should use the same approximate percentage reduction *below the minimum of the amended guideline range* that was used at the original sentencing for a reduction *below the mandatory minimum. See* U.S.S.G. § 1B1.10(c), Application Note 4.[5]

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[5] The pertinent Application Note provides two examples of application of the policy set out in subsection (c):

> *(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a*

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sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. See § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See § 5G1.1(b). For purposes of this policy

4. Operation of the policy statement here

The examples in Application Note 4 to U.S.S.G. § 1B1.10(c) do not address the specific circumstance in Feauto's case, where both his original guideline range and his amended guideline range are ***below*** his mandatory minimum sentence of 240 months. Feauto's original guideline range was 168 to 210 months, based on a Base Offense Level of 32, Total Offense Level of 33, and Criminal History Category of III. His amended guideline range, pursuant to Amendment 782, is 135 to 168 months, based on a Base Offense Level of 30, Total Offense Level of 31, and Criminal History Category of III. Thus, both guideline ranges are ***below*** his mandatory minimum sentence. In the absence of U.S.S.G. § 1B1.10(c), as explained in Application Note 4, U.S.S.G. § 5G1.1(b) would make the statutory mandatory minimum of 240 months Feauto's guideline sentence for his

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> *statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).*
>
> *To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.*

U.S.S.G. § 1B1.10(c), Application Note 4.

resentencing, as it was for his original sentencing. *See* U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."). The parties appear to be correct, however, that, § 1B1.10(c) would require me to consider Feauto's amended guideline range to be 135 to 168 months. I would then be directed to make any reduction for substantial assistance from the low end of the amended guideline range, using the same 45% reduction that I previously gave below his mandatory minimum, ***but now without regard to Feauto's statutory mandatory minimum sentence.***

II. LEGAL ANALYSIS

My concerns in this case are whether the *application* of Amendment 782, as called for in the pertinent policy statements in the Sentencing Guidelines, exceeds the Sentencing Commission's statutory authority and/or violates the nondelegation doctrine rooted in the separation-of-powers principle. A persistent theme in all of the parties' arguments is that the prior substantial assistance motion pursuant to § 3553(e) in Feauto's original sentencing "waived" the mandatory minimum for purposes of his resentencing pursuant to Amendment 782. Yet, that prior "waiver" did not "nullify" the mandatory minimum, because the mandatory minimum remained the starting point for any substantial assistance motion at Feauto's original sentencing. In my view, application of Amendment 782 in the way that the Sentencing Commission has called for does not simply recognize the prior "waiver" of the mandatory

minimum based on substantial assistance, as in the original sentencing. Rather, it is a complete "nullification" or "disregarding" of the mandatory minimum, at resentencing, because the resulting substantial assistance reduction is entirely detached from, or made without regard to, the mandatory minimum. As I pointed out, above, the reason for Amendment 782 was to "change[ ] how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties," not to *nullify* such penalties in certain situations or to alter the drug quantity that triggers a mandatory minimum. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment (quoted more extensively, *supra,* footnote 4). I conclude that a direction to disregard or nullify a statutory mandatory minimum sentence when resentencing a defendant pursuant to Amendment 782 and policy statement U.S.S.G. § 1B1.10(c) exceeds the Sentencing Commission's statutory authority and/or violates the non-delegation doctrine and the separation-of-powers principle. To put it another way, the authority to nullify mandatory minimums is not a power that the Sentencing Commission could usurp or, indeed, one that Congress could delegate. This is so, for several reasons.

A. Limits On The Authority Of The Sentencing Commission

My explanation begins with a brief summary of the non-delegation doctrine and the separation-of-powers principle and the corollary test to determine whether

agency action is *ultra vires.*[6] I recognize, at the outset, that neither the Supreme Court nor the Eighth Circuit Court of Appeals has found any merit in challenges to the Sentencing Guidelines on separation-of-powers grounds. *See, e.g., Mistretta v. United States,* 488 U.S. 361, 412 (1989) (no separation-of-powers violation in congressional delegation of authority to the Sentencing Commission); *United States v. Harris,* 688 F.3d 950, 957 (8th Cir. 2012) ("Every circuit that has considered the separation-of-powers issue has held that '[the] statutory provisions [in 28 U.S.C. § 994 and 18 U.S.C. § 3582(c)] are a sufficient delegation' of Congress's authority to the Sentencing Commission." (quoting *United States v. Garcia,* 655 F.3d 426, 435 (5th Cir. 2011)). In my view, that is not the end of the matter, here.

Rather, as the Supreme Court explained in *Mistretta,* under the separation-of-powers principle, "we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." 488 U.S. at 371–72, 109 S.Ct. 647 (quoting *Field v. Clark,* 143 U.S. 649, 692 (1892)). On the other hand, "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Id.* at 372, 109 S.Ct. 647. The Court applies an "intelligible principle" test to congressional delegations: "So long as Congress 'shall

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[6] *See* BLACK'S LAW DICTIONARY 1662 (9th ed. 2004) (defining *ultra vires*" as "[u]nauthorized; beyond the scope of power allowed or granted").

lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928)). One of the primary reasons that the Supreme Court upheld the Sentencing Guidelines over non-delegation or separation-of-powers objections was this:

> Although the Guidelines are intended to have substantive effects on public behavior (as do the rules of procedure), they do not bind or regulate the primary conduct of the public *or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime.*

Mistretta, 488 U.S. at 396 (emphasis added). It follows that, to the extent that specific Guidelines usurp the legislative responsibility for establishing *minimum* penalties for crimes, they violate the non-delegation doctrine and the separation-of-powers principle.

Furthermore, the question of whether actions of an agency or commission are *ultra vires* is whether there is a " 'plain violation of an unambiguous and mandatory provision of the statute.' " *Key Medical Supply, Inc. v. Burwell,* 764 F.3d 955, 962 (8th Cir. 2014) (quoting *Nebraska State Legis. Bd., United Transp. Union v. Slater,* 245 F.3d 656, 659 (8th Cir. 2001)). The dispute over the scope of the agency's authority must involve more than a dispute over statutory interpretation, however. *Id.* It must come down to whether the agency's action was a clear

departure from the statutory mandate or an abridgment of an interested party's statutory right. *Id.*

B. Ultra Vires Action Of The Commission

I find it appropriate to consider, first, whether the Sentencing Commission exceeded its authority in promulgating guidelines and policy statements concerning retroactive application of Amendment 782 that essentially nullify mandatory minimums on resentencing. Also, assuming for the sake of argument that the Sentencing Commission did have the necessary authority, I will consider whether Congress could properly delegate that authority.

1. Departure from the mandate for mandatory minimums

In my tentative opinion, I opined that there can be no serious debate that mandatory minimum sentences are clear and explicit "statutory mandates" that are controlling in the sentencing scheme for federal criminal offenses, subject only to limited exceptions. *See, e.g., United States v. Watts,* 553 F.3d 603, 604 (8th Cir. 2009) (*per curiam*) ("District courts lack the authority to reduce sentences below congressionally-mandated statutory minimums."); *United States v. Chacon,* 330 F.3d 1065, 1066 (8th Cir. 2003) ("[T]he only authority for the district court to depart below the statutorily mandated minimum sentence is found in 18 U.S.C. § 3553(e) and (f), which apply only when the government makes a motion for substantial assistance or when the defendant qualifies under the safety valve provision." (citation omitted)); *see also Key Medical Supply, Inc.,* 764 F.3d at 962 (framing the question of whether an agency exceeded its authority as whether

the agency's action was a clear departure from the statutory mandate or an abridgment of an interested party's statutory right). Much to my surprise, however, the Federal Defender did contest this point.

The Federal Defender asserts that Congress's delegation of the imposition of mandatory minimums to the executive branch, via the executive branch's charging authority and discretion to file notices of enhancement pursuant to 21 U.S.C. § 851, demonstrates that there is no clear statutory mandate that mandatory minimum sentences always be imposed in federal drug cases. It is true that prosecutors could always make mandatory minimum sentences based on drug quantity or § 851 "inoperative" in a particular case by refusing to charge drug quantities or prior conviction enhancements that invoke specific mandatory minimums, or any mandatory minimum at all, no matter what quantity of drugs was involved in the criminal conduct at issue and no matter what a defendant's prior criminal record might be. The ability of a prosecutor to *evade* a mandatory minimum by using the executive branch's well-established discretion in charging criminal offenses does nothing to lessen the statutory mandate for minimum sentences for defendants who *are* charged with and convicted of offenses for which Congress has established mandatory minimum sentences, as Feauto was in this case.

Yet, despite this statutory mandate for certain minimum sentences, U.S.S.G. § 1B1.10(c), as a policy statement implementing Amendment 782, clearly departs f.)m that statutory mandate, because it makes mandatory minimum sentences "inoperative"

in the context of a sentence reduction where a defendant has previously obtained a substantial assistance motion pursuant to both U.S.S.G. § 5K1.1 and § 3553(e). This is a usurpation of congressional responsibility for establishing *minimum* penalties for every crime, contrary to the Sentencing Guidelines as they existed at the time that the Supreme Court rejected non-delegation and separation-of-powers challenges to the Sentencing Guidelines in *Mistretta*. *See* 488 U.S. at 396. Thus, the Sentencing Commission's implementation of Amendment 782 is *ultra vires,* because it is a " 'plain violation of an unambiguous and mandatory provision of the statute[s]' " that create the federal sentencing scheme of mandatory minimum sentences. *See Key Medical Supply, Inc.,* 764 F.3d at 962 (quoting *Slater,* 245 F.3d at 659).

2. Possible sources of a mandate to nullify mandatory minimums

Even assuming that a statute could delegate to the Commission the power to disregard or nullify mandatory minimum sentences without violating the separation-of-powers principle, the statutory authority to do so must come from somewhere, but where? The parties and *amicus* put forward at least three nominees.

a. Section 3553(e)

The parties and *amicus* originally asserted that such statutory authority comes from 18 U.S.C. § 3553(e), the statute that, in the first instance, provides for imposition of a sentence below the mandatory

minimum for substantial assistance. That provision states:

> (e) **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. *Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.*

18 U.S.C. § 3553(e) (emphasis added). The parties assert that U.S.S.G. § 1B1.10(c) is a "guideline" or "policy statement" identified in the italicized sentence of § 3553(e), set out above. I disagree. The "guidelines and policy statements" identified in § 3553(e) are plainly those relating to *imposition of a sentence below a mandatory minimum to reflect a defendant's substantial assistance*. This is clear from the reference to "such sentence" in the italicized sentence, which relates to "a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance," in the previous sentence, not to "any sentence." Thus, the pertinent guidelines and policy statements referenced in § 3553(e) are in Chapter 5, Part K, of the Sentencing Guidelines, concerning substantial assistance to authorities. Again, Amendment 782 is *not* an

amendment to the "substantial assistance" guidelines. "Amendment 782 amended [U.S.S.G.] § 2D1.1," that is, it amended sentencing ranges determined by drug quantity, but it did not lower the sentencing ranges established on the basis of other offense or offender characteristics, such as "career offender" status under U.S.S.G. § 4B1.1, *Thomas*, 775 F.3d at 983, or, I would add, sentencing ranges based on or modified by "substantial assistance."

The prosecution argues—correctly—that nothing in § 3553(e) expressly identifies the pertinent guidelines and policy statements as those in Chapter 5, Part K. The prosecution goes on to argue that the plain language of the second sentence of § 3553(e) allows the court to consider other guidelines and policy statements issued pursuant to 28 U.S.C. § 994, such as U.S.S.G. § 1B1.10(c). The prosecution contends that it is significant that § 3553(e) only allows for the application of these guidelines and policy statements to impose a sentence below the mandatory minimum when there is a substantial assistance motion. I am still not persuaded.

Three matters seem extremely odd about the parties' construction of this last sentence of § 3553(e). First, the language of the sentence itself is an extremely convoluted way for Congress to create other unknown future exceptions to its power to create mandatory minimum sentences and exceptions to them, where that power belongs exclusively to Congress under the separation-of-powers principle. *See Mistretta*, 488 U.S. at 396. Nothing in this language even remotely suggests the sweeping power that the parties ascribe to it. Its plain meaning

modifies substantial assistance motions and nothing else. Although the prosecution explains that it is not arguing for a "sweeping construction" of this sentence of § 3553(e) that would apply outside of substantial assistance cases, that does not save its construction. The prosecution still attributes to the statutory language a construction that gives the Sentencing Commission the authority to promulgate policies that sweep away mandatory minimums *as if they did not exist at all* on resentencing, if a substantial assistance motion was filed in the original sentencing. Contrary to the prosecution's view, I find that the much more limited authority provided in the first sentence of § 3553(e) is only to "impose a sentence below a level established by statute as a minimum sentence *so as to reflect a defendant's substantial assistance*." 18 U.S.C. § 3553(e) (emphasis added); *see also United States v. Billue*, 576 F.3d 898, 902–04 (8th Cir. 2009) (in discussing a district court's limited authority under § 3553(e) and § 5K1.1 to impose a sentence below a statutory minimum, emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only factors related to a defendant's substantial assistance to the prosecution, and that, upon reducing a sentence below a statutory minimum, a court may not use § 3553(a) factors to decrease the sentence further). The power under § 3553(e) to reduce a sentence *below* a mandatory minimum is not the power to nullify the mandatory minimum entirely. Rather, it is the power to remove a mandatory minimum as an impediment to a lower sentence specifically "to reflect a defendant's substantial assistance," and only to do so. To put it another way, the power under § 3553(e) is not the

power to impose an amended sentence that entirely ignores the mandatory minimum and that is based in whole or in part on considerations *other than* substantial assistance.

Second, the placement of this alleged sweeping power delegated to the Commission, in a statute authorizing substantial assistance motions, seems even more peculiar. If Congress had intended that future "guidelines and policy statements" create additional exceptions from statutory mandatory minimum sentences, or nullify them, it is improbable that such authority would be placed in the second sentence of a statute authorizing substantial assistance motions. Thus, in my view, both the plain language of the second sentence of § 3553(e) and its placement strongly militate against the sweeping construction suggested by the parties.

Third, if the second sentence in § 3553(e) is construed as broadly as the parties suggest, then nothing would stop the Sentencing Commission, in the guise of reviewing and revising the Sentencing Guidelines pursuant to § 994(*o*), or as a matter of "policy," from directing that any defendant resentenced pursuant to a retroactive guideline amendment pertaining to base offense levels for drug quantities be resentenced to Base Offense Level 1 and Criminal History Category I. While this is, admittedly, an extreme example, there is no limit to the literally thousands of ways that, under the parties' view, retroactive guidelines could create exceptions to congressionally-mandated mandatory minimum sentences. There can be little doubt that such a policy would not only be a clear departure from the statutory

mandate for minimum sentences, but would also be a clear departure from the mandate that the only exceptions to mandatory minimums are in § 3553(e) and (f), for substantial assistance and "safety valve." *See Chacon*, 330 F.3d at 1066 ("[T]he only authority for the district court to depart below the statutorily mandated minimum sentence is found in 18 U.S.C. § 3553(e) and (f), which apply only when the government makes a motion for substantial assistance or when the defendant qualifies under the safety valve provision." (citation omitted)). In the absence of statutory authority to do so—which § 3553(e) does not provide—the Sentencing Commission's implementation of Amendment 782 is *ultra vires*. *See Key Medical Supply, Inc.*, 764 F.3d at 962 (quoting *Slater*, 245 F.3d at 659).

b. Section 3582(c)(2)

Because § 3553(e) does not provide the necessary statutory authority, the Federal Defender has, instead, pointed to § 3582(c)(2) in its comments on the tentative opinion.[7] This is so, even though I had indicated in my tentative opinion that I did not believe that § 3582(c)(2) provides the necessary authority. As I explained in the tentative opinion, the Seventh Circuit Court of Appeals has observed, "Nothing in § 3582(c)(2) permits a court to reduce a sentence below the mandatory minimum." *United States v. Forman*, 553 F.3d 585, 588 (7th Cir. 2009) (*per curiam*),

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[7] In its comments, the Federal Defender did not renew its argument that § 3553(e) provides the required statutory authority for § 1B1.10(c), at least tacitly acknowledging that § 3553(e) does not do so.

overruled on other grounds by United States v. Taylor, 778 F.3d 667 (7th Cir. 2015). Thus, in my view, there is no statutory mandate in § 3852(c)(2) to disregard mandatory minimum sentences upon resentencing. *See Key Medical Supply, Inc.*, 764 F.3d at 962. The Federal Defender argues, however, that once the statutory bar to sentences below a mandatory minimum has been waived by the government's substantial assistance motion pursuant to § 3553(e), § 3582(c) permits the Sentencing Commission to issue policy statements that give courts discretion to reduce a sentence that was based on a guideline range that has now been lowered, and to do so from an amended guideline range that is now *below* the mandatory minimum. This argument is apparently based on the portion of § 3582(c)(2) authorizing the court to make a sentence reduction, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The Federal Defender appears to argue that § 1B1.10(c) is an "applicable policy statement," specifically related to resentencing pursuant to § 3582(c)(2), and that, therefore, § 1B1.10(c) properly makes "inoperative" on resentencing § 5G1.1, which is the guideline that would otherwise make a mandatory minimum above the guideline range the guideline sentence. Indeed, the Federal Defender argues, it is only the existence of § 5G1.1, and the case law interpreting the guidelines with that provision in place in a substantial assistance context, that necessarily requires that the starting point for the substantial assistance departure be the mandatory minimum term in cases where the guideline range would otherwise be lower. The Federal Defender also cites as support the statement of the

Supreme Court in *Freeman v. United States*, 564 U.S. 522 (2011), that "[t]here is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range."

I am still not persuaded that § 3582(c)(2) provides the necessary statutory authority. As with § 3553(e), the language of § 3582(c)(2), is an extremely convoluted way for Congress to create unknown future exceptions to its power to create mandatory minimum sentences and exceptions to them, where that power belongs exclusively to Congress under the separation-of-powers principle. *See Mistretta*, 488 U.S. at 396. The language of § 3582(c)(2) is an even more convoluted way of doing so than § 3553(e), because the language of § 3582(c)(2) is silent as to either mandatory minimums or reductions below mandatory minimums for substantial assistance.

I also disagree with the Federal Defender's argument that it is only the existence of § 5G1.1, and the case law interpreting the guidelines with that provision in place in a substantial assistance context, that necessarily requires that the starting point for the substantial assistance departure be the mandatory minimum term in cases where the guideline range would otherwise be lower. To the contrary, it is § 3553(e) that authorizes reductions below the mandatory minimum, and then *only* "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e); *see, e.g., Billue*, 576 F.3d at 902–04 (in discussing a district court's limited authority under § 3553(e) and § 5K1.1 to impose a

sentence below a statutory minimum, emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only factors related to a defendant's substantial assistance to the prosecution, and that, upon reducing a sentence below a statutory minimum, a court may not use § 3553(a) factors to decrease the sentence further); *United States v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003) (explaining that, where a defendant's mandatory minimum exceeds his guideline sentence, any departure for substantial assistance must be from the mandatory minimum as the sentence that would otherwise have been imposed, because § 3553(e) was controlling). Thus, the "starting point" for a substantial assistance motion pursuant to a § 3553(e) is necessarily the mandatory minimum, at least where the mandatory minimum *exceeds* the guideline range.

Finally, *Freeman* is inapposite. A defendant whose mandatory minimum exceeded his guideline range is not a defendant "linger[ing] in prison pursuant to [a] sentence[ ] that would not have been imposed but for a since-rejected, excessive range." *Freeman*, 564 U.S. 522. Rather, he is a defendant in prison pursuant to a sentence imposed in light of his mandatory minimum and a statutorily-permissible reduction from the mandatory minimum for substantial assistance.

Section 3582(c)(2) does not provide the required statutory mandate to nullify mandatory minimum sentences in the implementation of Amendment 782. Consequently, the Sentencing Commission's implementation of Amendment 782 is *ultra vires*, if

based on § 3582(c)(2). *See Key Medical Supply, Inc.*, 764 F.3d at 962 (quoting *Slater*, 245 F.3d at 659).

c. Section 994(u)

The parties' final nominee as the source of a statutory mandate for the Sentencing Commission's policy for implementing Amendment 782 on resentencing, put forward by the Federal Defender, is 28 U.S.C. § 994(u). That provision states the following:

> (u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

The Federal Defender argues that this statute permits the Sentencing Commission to act as its own lexicographer in removing the applicability of § 5G1.1 in the retroactive implementation of Amendment 782. The Federal Defender argues that all that the Sentencing Commission is attempting to allow in resentencing cases is the application of the retroactive guideline amendment to those defendants who were sentenced pursuant to a guideline range, rather than a guideline sentence, that is now lower by function of the amendment.

The first fallacy with the Federal Defender's last nominee is a now-familiar one: The language of § 994(u) is an extremely convoluted way for Congress to create unknown future exceptions to its power to create mandatory minimum sentences and exceptions

to them, where that power belongs exclusively to Congress under the separation-of-powers principle. *See Mistretta,* 488 U.S. at 396. Like § 3582(c)(2), § 994(u) is silent as to either mandatory minimums or reductions below mandatory minimums for substantial assistance. Furthermore, a defendant whose mandatory minimum exceeded his guideline range was not a defendant sentenced pursuant to a guideline range, but a defendant sentenced pursuant to a mandatory minimum and a statutorily-permissible reduction from the mandatory minimum for substantial assistance. Nothing in § 994(u) authorizes the Sentencing Commission to nullify a mandatory minimum by directing the sentencing court to consider a defendant's amended guideline range below the mandatory minimum, rather than the mandatory minimum, as the starting point for a substantial assistance reduction.

Again, because neither § 994(u), nor any of the parties' other nominees, provides the necessary statutory authority for the Sentencing Commission's action, the Sentencing Commission's implementation of Amendment 782 is *ultra vires. See Key Medical Supply, Inc.,* 764 F.3d at 962 (quoting *Slater,* 245 F.3d at 659).

3. Pernicious Consequences

A further reason that I believe U.S.S.G. § 1B1.10(c) is a policy that clearly departs from the statutory mandate for mandatory minimum sentences is its pernicious consequences. As explained, above, under Amendment 782, using § 1B1.10(c) and Application Note 4, to resentence a defendant who was subject to a mandatory minimum exceeding his

guideline range, but who received a substantial assistance motion permitting him to be sentenced below his mandatory minimum, a resentencing court would consider the defendant's amended guideline range, not his mandatory minimum sentence. The court would then make any reduction for substantial assistance from the low end of the amended guideline range, even if it was below the defendant's mandatory minimum, using the same approximate percentage reduction that the court previously gave, ***without regard to that defendant's statutory mandatory minimum sentence.*** The result is a ***second reduction*** for substantial assistance upon resentencing.

Yet, a defendant being sentenced ***for the first time*** under Amendment 782, who also faces a mandatory minimum sentence exceeding his guideline range and who is eligible for a substantial assistance reduction below his mandatory minimum, is stuck with that mandatory minimum sentence as a "starting point" for any substantial assistance reduction, pursuant to U.S.S.G. § 5G1.1 and § 5G1.2. The result for that defendant is plainly consistent with the statutory mandates for mandatory minimum sentences and the exception for substantial assistance reductions below mandatory minimum sentences. It is also consistent with the purported goal of Amendment 782, which was to amend U.S.S.G. § 2D1.1, which sets sentencing ranges determined by drug quantity, but not to lower the sentencing ranges established on the basis of other offense or offender characteristics. *Thomas,* 775 F.3d at 983. The problem is that such a defendant is treated very differently from a defendant being ***resentenced*** under Amendment 782.

I cannot see how freeing a resentenced defendant from the mandatory minimum before making a substantial assistance reduction, while "tethering" a defendant being sentenced for the first time to his mandatory minimum sentence as the starting point for making a substantial assistance reduction can be anything but a clear departure from the statutory mandate for mandatory minimums. In my view, it is also a clear departure from the statutory mandate for the Sentencing Guidelines, which was, at least in part, to achieve fairness, uniformity, and proportionality. *See, e.g., United States v. Jackson,* 554 F.3d 716, 717 (8th Cir. 2009).[8]

Moreover, the construction urged by the parties creates another anomaly. Those defendants sentenced *to a mandatory minimum* that was either above or below their guideline range who did not cooperate get no relief from Amendment 782. This rewards cooperators a second time solely for their original cooperation and is not tethered to the actual purpose

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[8] To put it another way, disregarding a mandatory minimum sentence on resentencing, where a defendant previously received a substantial assistance motion, seems like "putting the cart before the horse." In every other sentencing scenario, the court would determine, first, the base offense level, which is the only step affected by Amendment 782; next, determine whether the defendant is subject to a mandatory minimum sentence that "trumps" the guideline range; then determine, last, whether any substantial assistance motion permits a reduction from the bottom of his guideline range (or the mandatory minimum operating as the bottom of the guideline range). Section 1B1.10(c), however, makes determination of whether there was a substantial assistance motion the *first* step, entirely skips the second step, and dictates that the amended guideline range is the starting point for any substantial assistance reduction.

of Amendment 782. This further renders the parties' position completely free-floating from the original purpose of Amendment 782—to ameliorate the harshness of the drug guidelines, not to reward cooperators twice. *See* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment (pertinent portion quoted in footnote 4, *supra*).

Indeed, if Feauto were sentenced for the first time today, with the 2–level reduced base offense level guideline provided by Amendment 782, his total offense level would drop from a 33 to a 31, and his guideline range would drop from his prior 168 to 210 months range to 135 to 168 months. But because Congress has mandated that a defendant in Feauto's position would have a mandatory minimum sentence of 240 months, which is above both his pre-Amendment 782 range and todays' post-Amendment 782 range, he would start at 240 months, receive his 45% substantial assistance reduction, and receive the identical sentence he received prior to the passage of Amendment 782. That is what he would get if he were sentenced for the first time today, and it is exactly what he got when he was originally sentenced on June 25, 2013, before Amendment 782 and the policy statements in § 1B1.10(c). In other words, neither Amendment 782 nor any other guideline or statute provides a way for Feauto to get to the sentence that the parties and *amicus* advocate, if he were sentenced today. Neither the parties nor *amicus* has any response to this anomaly. This anomaly demonstrates to me that the retroactive application of Amendment 782 called for by the Sentencing Commission's policy

statement in § 1B1.10(c) is irrational and, thus, *ultra vires, when applied to drug defendants whose mandatory minimum is above their guideline range.* Of course, if a drug defendant's guideline range is above a mandatory minimum, retroactive application of Amendment 782 could lower a sentence, potentially all the way down to a mandatory minimum, without a substantial assistance motion, or below it, with a substantial assistance motion. This places defendants sentenced prior to the passage of Amendment 782, when applied retroactively, in the identical position if they were sentenced after the effective date of Amendment 782.

Finally, disregarding a mandatory minimum sentence on an Amendment 782 resentencing, using § 1B1.10(c) and Application Note 4, changes the factors that are relevant to the determination of the extent to which a defendant's amended sentence might actually be below his mandatory minimum sentence, at least where the amended guideline range is below the mandatory minimum. This is so, because the amended guideline range is based on the offense and offender characteristics addressed by the Sentencing Guidelines, and the bottom of that amended guideline range would be below the mandatory minimum. Any reduction below the mandatory minimum, in other circumstances, however, must be based *solely* on factors relating to the defendant's substantial assistance. *See, e.g., Billue,* 576 F.3d at 902–04 (in discussing a district court's limited authority under § 3553(e) and § 5K1.1 to impose a sentence below a statutory minimum, emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only

factors related to a defendant's substantial assistance to the prosecution, and that, upon reducing a sentence below a statutory minimum, a court may not use § 3553(a) factors to decrease the sentence further); *United States v. Watts*, 553 F.3d 603, 604 (8th Cir.2009) ("[D]istrict courts may not consider the powder-to-base ratio disparity [in crack cases] when deviating from statutory minimums on consideration of substantial assistance motions under 18 U.S.C. § 3553(e)." (internal quotations and citations omitted)). Thus, disregarding a mandatory minimum sentence on an Amendment 782 resentencing, using § 1B1.10(c) and Application Note 4, is also a clear departure from the statutory mandate in 18 U.S.C. § 3553(e) that reductions below mandatory minimums be based on substantial assistance (and pursuant to § 3553(f), based on "safety valve" eligibility), not anything else.

C. Improper Delegation

The parties and *amicus* argue that, even if there is no specific statutory mandate for the Sentencing Commission's action in implementing Amendment 782 in such a way as to nullify mandatory minimums on resentencing, there is, nevertheless, clear congressional intent to allow the Sentencing Commission to do so. They point out that U.S.S.G. § 1B1.10(c) was an amendment to attempt to preempt the sort of circuit split that occurred in the implementation of the "crack" cocaine guidelines amendments. They also argue that at least some of what I have called "pernicious consequences" were raised in the public comments on the proposed amendment. Thus, the Federal Defender, in particular, argues that, to the extent that such

consequences are permitted to occur, they appear to have congressional support or, at the very least, congressional indifference.

These arguments prove too much. They are, in essence, arguments that *Congress* violated the non-delegation doctrine and the separation-of-powers principle. Again, as the Supreme Court explained in *Mistretta,* under the separation-of-powers principle, "we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." 488 U.S. at 371–72 (quoting *Field v. Clark,* 143 U.S. 649, 692 (1892)). As the Supreme Court expressly recognized in *Mistretta,* it is Congress's responsibility to establish minimum and maximum penalties for every crime. *Id.* at 396. The "intelligible principle" test invalidates any delegation of that power to the Sentencing Commission via Amendment 782 and U.S.S.G. § 1B1.10(c), because the parties have not identified, and I have not found, where and how Congress " 'la[id] down by legislative act an intelligible principle to which the [Sentencing Commission] is directed to conform,' " in nullifying mandatory minimum sentences on resentencing pursuant to Amendment 782, such that the delegation would not be forbidden. *Id.* (quoting *J.W. Hampton, Jr., & Co.,* 276 U.S. at 409). As my discussion of the various statutes nominated by the parties as the source of the Sentencing Commission's power to nullify mandatory minimums shows, the parties' reading of those statutes would create a sweeping authority to act, not a direction to conform to any intelligible principle. It follows that, where § 1B1.10(c) usurps the legislative

responsibility for establishing *minimum* penalties for crimes, and assuming, *arguendo,* that Congress has tacitly approved that usurpation, Congress has violated the non-delegation doctrine and the separation-of-powers principle, and § 1B1.10(c) is invalid.

III. CONCLUSION

I conclude that nullifying or disregarding a mandatory minimum sentence on an Amendment 782 resentencing, using § 1B1.10(c) and Application Note 4, is a clear departure from statutory mandates concerning mandatory minimum sentences and reductions below mandatory minimums only for substantial assistance (or "safety valve" relief), and violates the nondelegation doctrine and the separation-of-powers principle. I find no statutory authority, and the parties and *amicus* have identified no convincing nominees, authorizing the Sentencing Commission to promulgate guidelines or policy statements that disregard mandatory minimum sentences. Assuming, *arguendo,* that Congress may be understood to have tacitly approved those guidelines and policy statements, Congress violated the non-delegation doctrine and the separation-of-powers principle. Thus, those guidelines and policy statements purportedly implementing Amendment 782 are in excess of the Commission's statutory authority and in excess of Congress's power to delegate.

Amendment 782 properly changes only a defendant's base offense level, not the effect of his mandatory minimum sentence or his prior substantial assistance. The Sentencing Commission, itself,

explained that the reason for Amendment 782 was to "change[ ] how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties," not to *nullify* such penalties in certain situations or to alter the drug quantity that triggers a mandatory minimum. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment. Thus, the proper net effect of Amendment 782 is that it can only reduce the sentence of a defendant who originally received a reduction for substantial assistance if he had no mandatory minimum or both his original guideline sentence and his amended guideline sentence are above his mandatory minimum. This construction places defendants with mandatory minimum sentences in the identical position if they were sentenced prior to or after the retroactive application of Amendment 782 and achieves the sentencing purpose of avoiding unwarranted sentencing disparity.

Here, because Feauto was subject to a mandatory minimum sentence exceeding both his original guideline range and his amended guideline range, and he has already received a reduction below that mandatory minimum for substantial assistance, I conclude that he is not entitled to any further reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782. Specifically, any substantial assistance reduction on resentencing would properly start from the same point (Feauto's mandatory minimum sentence), consider the same factors, and result in the same percentage reduction from his mandatory minimum sentence, so that the

final sentence would be exactly the same. There is simply no indication that the purpose behind Amendment 782 was to give previously sentenced defendants with mandatory minimum sentences a sentencing break that they would not receive if sentenced today pursuant to Amendment 782.

THEREFORE, defendant Feauto is **denied** a sentence reduction pursuant to Amendment 782 to the United States Sentencing Guidelines and 18 U.S.C. § 3582(c)(2). Because the views expressed in this opinion seem at odds with those of both the defendant and the Department of Justice, and perhaps with those of other judges in the nation, I strongly encourage Mr. Feauto to appeal this ruling. Encouragement, no doubt, he doesn't need.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH JAY PUTENSEN, Defendant.	No. CR 07-3008-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**
UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY D. KOONS, Defendant.	No. CR 10-4031-2-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**
UNITED STATES OF AMERICA, Plaintiff, vs. JUAN MANUEL GARDEA, Defendant.	No. CR 14-4017-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**

UNITED STATES OF AMERICA, Plaintiff, vs. ESEQUIEL GUTIERREZ, Defendant.	No. CR 14-401-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**

For the reasons set forth in detail in my November 23, 2015, Memorandum Opinion And Order Regarding Resentencing Of Defendant Pursuant To Amendment 782 To The United States Sentencing Guidelines in *United States v. Feauto*, No. CR 12-3046-MWB (docket no. 92), a copy of which is attached,

1. The resentencing hearing for each defendant identified above, currently scheduled for December 21, 2015, is **cancelled**;

2. Each defendant is **denied** a sentence reduction pursuant to Amendment 782 to the United States Sentencing Guidelines and U.S.C. § 3582(c)(2); and

3. I strongly encourage each defendant to appeal this ruling.

IT IS SO ORDERED.

DATED this 23rd day of November, 2015.

/Mark. W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.: 15-3794

United States of America
Appellee

v.

Timothy D. Koons
Appellant

No.: 15-3825

United States of America
Appellee

v.

Kenneth Jay Putensen
Appellant

No.: 15-3854

United States of America
Appellee

v.

Randy Feauto
Appellant

No.: 15-3880

United States of America
Appellee

v.

Esequiel Gutierrez
Appellant

No.: 15-3894

United States of America
Appellee

v.

Jose Manuel Gardea
Appellant

Appeal from United States District Court for the
Northern District of Iowa – Sioux City

(5:10-cr-04031-MWB-2)
(3:07-cr-03008-MWB-1)
(3:12-cr-03046-MWB-1)
(5:14-cr-04016-MWB-1)
(5:14-cr-04017-MWB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

May 25, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY D. KOONS, Defendant. /	Nos. CR00-3041 CR10-4031 TRANSCRIPT OF REVOCATION HEARING and SENTENCING

The Revocation Hearing/Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, October 15, 2010, commencing at 1:32 p.m.

APPEARANCES

For the Plaintiff: SHAWN S. WEHDE, ESQ.
Assistant United States Attorney
Ho-Chunk Centre - Suite 670
600 Fourth Street
Sioux City, IA 51101

For the Defendant: ROBERT A. WICHSER, ESQ.
Assistant Federal Defender
Suite 400
701 Pierce Street
Sioux City, IA 51101

Also present: Beth Kraemer, U.S. Probation

Reported by: Shelly Semmler, RMR, CRR
320 Sixth Street
Sioux City, IA 51101

(712) 233-3846

[2]

THE COURT: Thank you. Please be seated. Good afternoon. This is United States versus Timothy D. Koons, Criminal Number 10-4031. The defendant's personally present represented by Robert Wichser. And the U.S. Attorney's Office is represented by Assistant U.S. Attorney Shawn Wehde. And we're here for sentencing.

Mr. Wichser, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. WICHSER: Yes, Your Honor.

THE COURT: And actually we're also here on a revocation of terms of supervised release, and so have you had a full, fair, and complete opportunity to review the petition for warrant for offender under supervision with your client?

MR. WICHSER: Yes, Your Honor.

THE COURT: And are you contesting any of the – let's see, the one, two, three, four, five, six, seven, eight violations? Are you contesting that at all?

MR. WICHSER: I only have six on my copy.

THE COURT: Well, except one of them there are three separate violations.

MR. WICHSER: Oh, yes. Yes. No, we are not contesting.

THE COURT: Depends on whether you count the right-hand column or the left-hand column.

MR. WICHSER: That's right. I was unfortunately [3] counting the left-hand column.

THE COURT: Left-hand column, you come up with six. You count the right-hand column, you come up with eight because under the first one there's an a, b, and c.

MR. WICHSER: Yes.

THE COURT: Yeah. Are you contesting any of those?

MR. WICHSER: We do not contest those, Your Honor.

THE COURT: Okay. Now, switching back to the presentence investigation report, have you had a full, fair, and complete opportunity to go over the presentence investigation report with Mr. Koons?

MR. WICHSER: Yes, Your Honor.

THE COURT: And you have some objections, but I don't believe I have to rule on any of the objections. You have an objection to the recency point; correct?

MR. WICHSER: Yes, but it has no effect on the guidelines.

THE COURT: It has no effect on the actual guideline calculation, so that's moot. And then you did object to the descriptions in the criminal history category violations, and we just have a disagreement over that, so I guess I could overrule your objection.

MR. WICHSER: Yes, Your Honor.

THE COURT: Yes. And there aren't any other contested guideline issues. [4]

MR. WICHSER: No, Your Honor.

THE COURT: And so do you agree that the total offense level is 31, criminal history category 4,

advisory United States Sentencing Guideline of 151 to 188 months, but those are trumped because there's a mandatory minimum sentence of 20 years or 240 months, and that trumps the advisory guideline range?

MR. WICHSER: That is correct, Your Honor.

THE COURT: And, Mr. Wehde, do you agree with those guideline calculations?

MR. WEHDE: Yes, Your Honor.

THE COURT: And there aren't any contested guideline issues from the government's perspective.

MR. WEHDE: That is correct.

THE COURT: And the only remaining issue I believe is substantial assistance.

MR. WEHDE: That is correct, and we will be making both motions in this case.

THE COURT: Okay. Would you like to do that at this time?

MR. WEHDE: Sure. At this time the United States would move under United States Sentencing Guidelines 5K1.1 and Unite – and 18 United States Code section 3553(e) for a downward departure for the defendant's having provided substantial assistance.

In this case defendant was captured in a traffic stop [5] near Cherokee of – a pound of methamphetamine was seized from him. At the time he was under a degree of surveillance, but more importantly, his source, Codefendant Lupian, was the target of the investigation, was kind of – was under surveillance, the tracker on his vehicle, they had followed him, they had watched a meeting before Mr.

Koons and him when they met, and then they watched him on that occasion.

They stopped Mr. Koons' vehicle, and they seized the pound of methamphetamine and then used the – their overall investigation regarding Mr. Lupian combined with the surveillance of watching the contact between Mr. Lupian and Mr. Koons to – and their seizure of the pound of methamphetamine to write a search warrant for Lupian's residence.

The reason I provide that background is that they also included not only the methamphetamine that was seized which Mr. Koons would have had nothing to do with – that was law enforcement's operation – but they also included a statement that upon his arrest he did give a brief post-Miranda statement and was giving that during the investigation, but they utilized the statement from him that I got – the methamphetamine you just seized came from the guy in that car, didn't have a name.

They put that in the search warrant. That helped support the search warrant of Mr. Lupian's residence. They had quite a bit of other information and surveillance of Mr. Lupian [6] prior to that, but that was the capper, that particular incident, the seizure of the methamphetamine as supported by his statement at that time.

The – at Mr. Lupian's residence we recovered quite a bit of methamphetamine, 3 pounds, quite a bit of cut, $78,000. Mr. Lupian came in right away as did Mr. Koons and did debrief. And so – and both of them pled guilty to that.

So Mr. Koons' information had an impact on the search warrant to some degree, and then he also

provided information about a couple of customers. He also provided information about one particular person, his ex-wife who goes by the same name as his, Cindy Koons, as the person who reintroduced him to this source of supply.

The reason that's a little bit confusing – and I say reintroduced – is because Mr. Koons had had connections with this group, not these particular individuals but some of their higher-ups, eight years before when he had his prior federal offense that is the subject of the TSR violation. So – but Ms. Cindy Koons was using these sources over those years, reintroduces Mr. – Mr. Tim Koons to that source of supply just a month or month and a half before his arrest. So he provides information about her. That's an ongoing investigation at this time as is anything else that he has told us.

Due to the fact that he only was in this essentially about a month and a half, he didn't have a lot of people to talk [7] about. He had about three main customers, and he had Cindy Koons who had introduced him and then the Denison connection that – Mr. Lupian that I've talked about, and he also gave information regarding their – how he acquired the dope, that is, text messages to a couple of individuals with California phone numbers whose names he doesn't – whose names or nicknames he doesn't know. He knows them by a first name which may well be a nickname.

So long story short, those are all in the process of various stages of investigation. The only case that has any real ripeness to – or ability in the future is Cindy Koons. The others are more suspect on what we can or can't do based on ongoing investigations.

We are recommending at this time based on his help in regards to those matters – and I think I failed to state that at his request and his attorney's request we did put Mr. Koons into grand jury on Cindy Koons, and we also put him in the grand jury on the other customers. He had one customer here in South Sioux City and two up in the Emmetsburg or northwest Iowa area whose cases are very suspect as to whether they'll go anywhere, but Mr. Koons wanted to get his grand jury in so he wasn't brought back and had to face issues in prison. So we put him in early on those cases. So he has done that as well.

We are recommending both motions, a 15 percent departure on this case for what he has done to further an [8] investigation of Miss Koons and to provide some partial support for the search warrant in Mr. Lupian's case. The rest of it is a little more – is a little less ripe at this time. And we've discussed the Rule 35 possibilities with both Mr. Koons and his counsel.

THE COURT: What is the likelihood of a Rule 35 motion?

MR. WEHDE: Extremely likely. Ms. Koons is – that case is going to happen. It's just a matter of when it will happen. The other cases are less likely. We have to get a few lucky breaks. Maybe Ms. – and we have to – basically to be honest, we have to have Ms. Koons' cooperation in order to get to that level.

THE COURT: And with regard to Lupian, I assume he would have been charged regardless of whether you actually got the search warrant or not at some point or not necessarily? And what I'm trying to figure out is –

MR. WEHDE: How helpful –

THE COURT: Yes. What's your evaluation under the 5K1.1 factor with regard to how helpful Mr. Koons' information was in getting the search warrant, and would you have gotten Lupian in any event even without Mr. Koons' help?

MR. WEHDE: I think eventually we would have gotten Mr. Lupian whether we had Mr. Koons' help or not because we would have gotten somebody's help. We already had two CIs into [9] that individual already. But what made Mr. Lupian's case is the search warrant. I mean, you catch a guy with 3 pounds of dope, 6 pounds of cut, and $78,000 regardless of his degree of involvement – and there are others involved – that ends – I mean, that forces his – either a plea or cooperation which is what it has forced.

Could we have gotten a search warrant without Mr. Koons' statement that that just came from that guy? Probably because you do the surveillance, you watch what happens, the dope's coming from this car. But it's certainly a lot easier to get if you have the guy who you just grabbed say, "Two minutes ago I just got it from the guy in that car."

So it was helpful. It wasn't crucial, but it was very – I'd have to say it's important. So – and then the search warrant is what made the Lupian case at that time. I mean, you can do a what-if scenario on about anything, but he was helpful in helping secure that search warrant, but the likelihood – getting Mr. Lupian and getting Mr. Lupian to plead probably had more to do with what was found and the other evidence that also – that Mr. Koons basically provided corroboration of.

THE COURT: Any other of the 5K1.1 factors come into play?

MR. WEHDE: Let me check this.

THE COURT: Completely truthful, complete, and [10] reliable in terms of his post-Miranda and grand jury and debriefings?

MR. WEHDE: Just one explanation of that. His post-Miranda statement wasn't – I don't want to say it wasn't truthful. It wasn't complete. We didn't – and that could be in part due because when we debriefed him a short time later we came up with more exchanges between him and Mr. Lupian.

THE COURT: But it's probably a more thorough—

MR. WEHDE: It was a more thoroughly done interview which most debriefings are. So it wasn't complete, but it was truthful to the extent of what was told; and, therefore, it was helpful in regards to Mr. Lupian. But otherwise there would be – his information was timely.

We have no information regarding any threats or those issues. And I think I've detailed the other information.

THE COURT: Okay. Anything else you'd like to add?

MR. WEHDE: No.

THE COURT: Okay. Thank you.

Mr. Wichser, on the nature of the substantial assistance?

MR. WICHSER: Yes, Your Honor. As the Court is well aware, it's difficult to debate with the

government the percentages that they present to the Court because we have no idea as to how those percentages are arrived at. I think that the 15 percent is rather miserly in this case when you compare [11] it to the 5K.1 factors.

Mr. Wehde neglected to point out to the Court that when Mr. Koons testified before the grand jury they gave – Mr. Koons gave a brand new name to the grand jury as well as to the government of a long-time drug trafficker in northwest Iowa that the government has never been able to arrest or convict until several days after Mr. Koons' testimony in the grand jury. They then – officers then went up to the Estherville, Iowa, area and did arrest the person that Mr. Koons talked about. And then he was brought back to the same holding facility that Mr. Koons was in, so there was some danger to Mr. Koons with the placement of this individual.

THE COURT: Now, has that individual been charged in state court or federal court?

MR. WICHSER: Federal court, Your Honor. And then he was for some reason not detained, and then he went back up to the same area where Mr. Koons' – all of his family lives. So I'm pointing that out because that's factor (a)(4) that I think the Court should place some credence in.

THE COURT: Well, it also goes to factor (1) and (3).

MR. WICHSER: Yes.

THE COURT: Let me just kind of interrupt you. What about that, Mr. Wehde?

MR. WEHDE: I do not dispute that Mr. Koons talked about that individual at the time of his witness prep interview [12] for the grand jury. But what I can say is that his information had absolutely – I mean, unfortunately for him had absolutely nothing to do with that individual's arrest. There was a completely different investigation. We already knew of this subject anyway, and Mr. Koons knew that, and his information will be a part of that investigation as it goes forward as well as others that have talked about that person, but we captured that person with a different CI, a buy, and a search warrant that his information had – was not even utilized for due to the timing and due to the timing of that ongoing investigation. They had that in the works before he talked, and they used that information. It was coincidental.

I understand that the timing and I understand the thought process and going forward the fact that that individual may cooperate or may plead may have to some degree – be impacted to some degree by what Mr. Koons knows. But Mr. Koons didn't have any direct contact with that individual. It was basically —

THE COURT: So let me – if I understand this correctly, your office did not give him any credit in terms of your recommendation because it really had nothing to do with it, but it's possible down the road that that may affect either whether to make a Rule 35(b) motion or the extent of – I mean, it could come into play on a Rule 35(b) motion.

MR. WEHDE: Yes. [13]

THE COURT: Okay. Do you dispute that, Mr. Wichser?

MR. WICHSER: No, Your Honor. Of course, I was not at the grand jury. I have no way of knowing.

THE COURT: Right.

MR. WICHSER: I'm just relating what – the discussions I had with my client with respect to this individual.

THE COURT: Sure. And given the close proximity between the information and the arrest, it would certainly be reasonable to draw a conclusion that there was a cause and effect because you're not privy to all of the information that Mr. Wehde is about this independent investigation.

MR. WICHSER: And I also know from experience that this Court is very concerned about danger to existing defendants as well as their family members due to the nature of cooperation and the way that investigations transpire in the Northern District of Iowa.

THE COURT: Right. Okay. I cut you off. Is there anything else you want to add on the extent of your client's substantial assistance?

MR. WICHSER: No, Your Honor.

THE COURT: Why don't we take up the violations of supervised release. Does the government have a sentencing recommendation on that?

MR. WEHDE: Yes, Your Honor. After speaking with U.S. [14] Probation, it's – I guess we're concurring with their recommendation or at least the recommendation that we last knew of which is for, I believe, 12 months consecutive to any term served – any term assessed by the Court in this particular sentencing.

We're asserting to the Court that since it happened – since his new offense involved significant quantities of methamphetamine, half pounds and pound quantities per transaction similar to the weights that were involved back in his earlier case, and the fact that it only was a few short months after he was on release that he was reinvolved, we believe that some term of consecutive time would be appropriate.

I don't recall the maximum, but the 12 months is not the maximum. I believe it may be half of what the maximum may be, and that is U.S. Probation's recommendation, and we are concurring in that recommendation.

THE COURT: Mr. Wichser?

MR. WICHSER: Your Honor, that's a – of course, a policy statement of the guidelines. In view of the nature of the impending sentence with Mr. Koons, the defense would request that the Court consider some combination of concurrent and consecutive with respect to the supervised release violation.

THE COURT: Given the fact that he's looking at a 240-month sentence, it kind of appears to be maybe – in football they call it a penalty for piling on, but, you know, [15] there should be probably some incremental punishment. I understand that.

Mr. Koons, you have the right on both the sentencing on the criminal case and then the violation of supervised release to say anything to me that you want to. You don't have to say anything. You have a right to remain silent. If you exercise your right to remain silent, I will not hold it against you in any way. But if you'd like to say something, I'd be happy to hear from you. Is there anything you'd like to say?

THE DEFENDANT: Yes, Your Honor. Yes, Your Honor.

Your Honor, you know, I take full responsibility for everything I've ever done in my life. I knew better. You know, when I got out of prison, my family supported me, and I let them down.

I want to apologize just to society because, you know, it took 41 years, 42 years to realize that drugs don't do anything but wreck dreams and hopes. I have probably the most wonderful parents in the world. I know I broke my dad's heart. And no matter what the Court gives me for punishment, I'll probably never see him again alive after today. They won't come see me. I don't blame them.

And there's – I got a 14-year-old daughter that's had 5 years with her dad. Now here it is again doing the same thing. People don't under – probably don't know how sorry I am, but I am truly sorry for what I did, and I'm so sorry to [16] society.

And there's one other person I want to say I'm sorry to that she's not here. She's in a drug rehab out in Gordon, Nebraska. Because of me going to jail she relapsed, and I wrecked her life because of that because she had hopes and dreams of spending her life with me. I hope she does well. And I'm sorry, Your Honor, for what I did. Thank you.

THE COURT: Thank you.

Anything either lawyer would like to add?

MR. WICHSER: No, Your Honor.

MR. WEHDE: No, Your Honor.

THE COURT: Okay. On the underlying criminal charge, I find the total offense level is 31, criminal

history category 4, advisory guideline range 151 to 188 months, but there's a mandatory minimum 240-month sentence.

The government's made both substantial assistance motions which allows me to go below the mandatory minimum of 240 months. Government's recommended a 15 percent reduction. If I follow the government's recommendation of 15 percent off of 240 months, would take the sentence down to 204 months.

I think the government's recommendation is a little bit low in this case. It's certainly not unreasonable. It's within the range of what would be reasonable. But I think in light of the fact that Mr. Koons has done both grand jury work and did an initial post-Miranda debriefing, the fact that he's [17] been truthful, complete, and reliable, the fact that his post-Miranda briefing was extremely timely, and that his information led to the – was very instrumental, was of considerable assistance in obtaining the search warrant, undoubtedly the government would have been able to prosecute Mr. Lupian at some point, but getting the search warrant made that case virtually airtight. Defendant really had no choice at that point other than to cooperate if he wanted to reduce his own assistance. So, you know, I think Mr. Koons' information was very significant there.

And so looking at all of the 5K1.1 factors, you know, I'm not convinced that there's really any risk of danger to the family other than the proximity in the same community, and that happens in 90 percent of the cases, and there's hardly ever a risk of danger. So absent some actual threat, I don't think there's any evidentiary basis to find the fourth factor.

So I'm going to grant a 25 percent reduction and reduce the sentence from 240 months down to 180 months and – got a lot of paperwork here, so bear with me.

Oh, I think you wanted to offer the letters, Defendant's Exhibit A.

MR. WICHSER: Yes, Your Honor. I'll offer Defendant's Exhibit A, please.

* * * *

(Defendant Exhibit A was offered.) [18]

* * * *

THE COURT: And I assume there's no objection, Mr. Wehde.

MR. WEHDE: No objection.

THE COURT: Defendant's Exhibit A is received.

* * * *

(Defendant Exhibit A was admitted.)

* * * *

THE COURT: Of course, in this case the 35 – Title 18, 3553(a) factors do not come into play because I'm not allowed to consider those because those could only take me down to the mandatory minimum, and here we start at the mandatory minimum rather than above the mandatory minimum. So I don't even need to make a finding that this sentence is sufficient but not greater than necessary, although I believe a sentence of 180 months is sufficient and not greater than necessary.

So it's my judgment that you are hereby committed to the custody of the Bureau of Prisons to be

imprisoned for a term of 180 months on Counts 1 and 2 to run concurrently.

With regard to the supervised release revocation, I am going to revoke your supervised release. I'm going to impose an additional 12-month sentence, 6 months to run concurrently, 6 months to run consecutively with the sentence that I've just imposed on the underlying case.

Is there a facility you'd like me to recommend, [19] Mr. Wicheser?

MR. WICHSER: Yes, Your Honor. The defendant would respectfully request placement at the federal medical facility in Rochester or, in the alternative, the Federal Correctional Institute in Sandstone, Minnesota.

THE COURT: Well, paragraph 66 of the presentence report, that would be rather inconsistent with a recommendation for Rochester.

MR. WICHSER: Well, Your Honor, the reason that he is seeking Rochester is because he has a certain amount of trade skills that could be used if he could get into the cadre at Rochester rather than be treated as a –

THE COURT: Sure. And you're right. 50 percent of the inmates in Rochester have serious medical problems. The other 50 percent have virtually no medical problems, and they do the work.

MR. WICHSER: Yes.

THE COURT: So okay. With that understanding, I understand. Sure. And what was the back-up? Sandstone?

MR. WICHSER: Yes.

THE COURT: Yeah, okay.

MR. WICHSER: Sandstone, Minnesota.

THE COURT: I'll be happy to recommend Rochester, Minnesota, with a back-up of Sandstone, Minnesota. And the recommendation to Rochester is not based on any medical [20] condition. Matter of fact, it's the opposite. Rochester's very unique. I visited there last August – a year ago August, and you either have to be very sick or not sick at all. If you're kinda sick, you don't get in there. If you have, you know, modest or minor health problems, you're not in there, so they have the healthy group and the not-so-healthy group. But you're right. Half the inmates there are in the healthy group, so that's what I'll recommend.

I'm also going to recommend the 500-hour residential drug treatment program where you can earn up to a year off your sentence if you successfully complete that, although the average inmate last year earned about 8 months off their sentence.

Upon release from imprisonment, you'll be placed on supervised release for 10 years on each count to run concurrently. While you're on supervised release, you can't violate any state, local, or federal law. You can't possess any illegal drugs. You cannot possess a firearm, ammunition, destructive device, or dangerous weapon. You'll never be allowed to possess a firearm or ammunition unless you successfully petition the Bureau of Alcohol, Tobacco, Firearms, and Explosives to have your rights restored. You'll cooperate in the collection of a DNA sample.

You'll have the following special conditions on supervised release. You'll participate in a program of testing and treatment for substance abuse. You're

prohibited from using [21] alcohol and going to bars, taverns, and other establishments whose primary source of income is derived from the sale of alcohol.

And upon release from imprisonment, you'll be placed in a residential reentry center which is a fancy new federal term for a halfway house for up to 120 days. You'll be subject to the standard search condition which means a U.S. probation officer can search your person, residence, automobile, and the like if they have reasonable suspicion you're violating your supervised release.

You don't have the ability to pay a fine, so the fine is waived. There's a special assessment of a hundred dollars on each count for a total of $200.

You're remanded to the custody of the United States marshal to serve this sentence.

I did want to advise you that once you get out if you have another drug conviction in state or federal court and you're sentenced in federal court, you'd have a mandatory life sentence with no possibility of parole.

You do have a right to appeal the sentence that I've imposed. If you decide to appeal, you need to file a written notice of appeal with the clerk of our court no later than 14 days after your judgment is signed. If you can't afford to pay for a lawyer or pay for the costs of an appeal, those costs will be paid on your behalf. [22]

I want to talk to you briefly and explain to your family and friends who are here about this term that we've thrown around that I'm sure Mr. Wichser has talked to you about, and that's a Rule 35(b) motion. That is a substantial assistance motion that occurs after you've been sentenced.

So it is possible that based on the information you provided to the grand jury and, you know, you may be needed in a sentencing proceeding or in a trial, for example, if your ex-wife went to trial, to provide additional information.

The U.S. Attorney's Office is the only office that can make the Rule 35(b) motion on your behalf. Mr. Wichser doesn't have the power to make that on your behalf. I don't have the power to make that on your behalf. Congress has given the U.S. Attorney's Office the sole discretion to make that motion, and they never have to make the motion because it's discretionary. They can decide for whatever reason they want to not to make the motion, or they can make the motion. My impression is that they're very fair in evaluating whether or not to make a Rule 35(b) motion.

And I'm telling you all of this because if the U.S. Attorney's Office does make a Rule 35(b) motion on your behalf, the number-one thing that I will look at – I'll look at all the factors I talked about in deciding to reduce your sentence by 25 percent rather than the 15 percent the government recommended.

But the number-one thing I look at is to make sure [23] that your substantial assistance is truthful because sometimes cooperating defendants – and I certainly understand this, particularly ones that are looking at lengthy sentences like the one you just received – they have a huge incentive to either totally make things up or simply embellish things because they think they're trying to help the prosecutors.

And if I find that you've either made something up or not been a hundred percent truthful, usually I won't give any further reduction at all; or if I do give you a

reduction, it will be much, much smaller than even what the government recommends, and the government doesn't usually recommend a whole lot. So you're either looking at not getting anything off your sentence or a very small amount of time.

So what you've already done in the grand jury is pretty much water over the dam. You're either truthful or you weren't, but any additional substantial assistance, you need to know that if I find that you weren't truthful – and I'm the sole judge of that – I will not reduce your sentence at all or give you a very, very small reduction.

But if the government does make the motion, the Rule 35(b) motion, and if I find that your substantial assistance was truthful, as I sit here today, I don't know of any reason why I would not be willing to give you a further reduction in your sentence.

So I just wanted to make sure you understand the [24] process for a Rule 35(b) motion. And, Mr. Koons, do you have any questions about that?

THE DEFENDANT: No, sir.

THE COURT: Okay. And I know how sorry you are. You know, it's – it's a really, really horrible drug, and it ruins a lot of people's lives, people with good intentions, and I see that almost every day. And I just – the only thought I wanted to leave you with is that, you know, I'm sure you're a good person. I could tell that from the letters, and you just, you know, have a powerful draw to methamphetamine. And I know you don't feel very lucky because I wouldn't exactly call today a lucky day for anybody, particularly getting a long sentence like you received. But you're fortunate in this regard. You have a lot of family support, and

that's what families do. They love people unconditionally. They look past the fact that they've made mistakes. They see the good in you, and there's a lot of good. Everybody – I've only met a handful of people in this courtroom that I didn't think had some good. Lot of them have a lot of good.

But the saddest day of my life – and it's something I will never forget. I've been a United States District Court judge – I'm now in my 17th year which means I started in 19 – I was appointed by the President in 1994. And during my first year I came out to sentence a defendant. She was a female. That was pretty rare back then. Now we see a lot of female [25] defendants, but in '94 it was pretty rare. And she had 5 prior convictions, but when I read her presentence report, I always take a close look at the family, and I noticed that she had 10 brothers and sisters that all lived in the Sioux City area. And when I came out on the bench to sentence her, there wasn't a single person in the back of the courtroom. All of her brothers and sisters had given up on her.

And you're my fourth criminal – fourth or fifth criminal proceeding today. I couldn't even tell you the names of the ones I had this morning because I forget them as fast as I do them. It's kind of my way of coping with the heavy criminal caseload we have. You know, I do a lot of sentencings every week. We're fifth in the nation in terms of number of sentencings per judge of the 94 districts.

And I don't remember that woman's name, but I'll never forget walking out in the courtroom and seeing nobody here because they'd just given up on her.

So as bad of a day as this is for you, the good news is you've got a lot of family support, and that's a really good thing.

So I hope the time passes quickly for you, and good luck to you. And I do hope I have an opportunity to have you back on a Rule 35(b) motion and have an opportunity to reduce your sentence.

Mr. Wichser, is there anything further? [26]

MR. WICHSER: Yes, Your Honor. As you know, the defendant has been detained since the arrest in this case. He has considerable family here today that have come some distance. If it would be all right with the marshals, could you request a brief family visit?

THE COURT: Absolutely. I'm going to request that. Doesn't have to be that brief either. He's going away for a long, long time.

MR. WICHSER: Thank you.

THE COURT: So whatever time the marshals can – they're very busy today. We've had a lot of folks in and out of the courthouse, but this is an important matter, and I'm sure they'll give all the consideration they can to allowing you as much of a visit as they can allow.

Mr. Wichser, anything further?

MR. WICHSER: No. Thank you, Your Honor.

THE COURT: Thank you for your representation.

And, Mr. Wehde, anything further?

MR. WEHDE: No, Your Honor.

THE COURT: Thank you for your representation.

Good luck to you, Mr. Koons.

THE DEFENDANT: Thank you.

THE COURT: We'll be in recess.

(The foregoing sentencing was concluded at 2:13 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RANDY FEAUTO, Defendant. /	No. CR12-3046-MWB-1 TRANSCRIPT OF SENTENCING

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, June 25, 2013, commencing at 11:02 a.m.

APPEARANCES

For the Plaintiff:	SHAWN S. WEHDE, ESQ. Assistant United States Attorney Ho-Chunk Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	JIM K. MCGOUGH, ESQ. Suite 100 11920 Burt Street Omaha, NE 68154
Also present:	Stacy Sturdevant, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101 (712) 233-3846

[2]

THE COURT: Thank you. Good morning. Please be seated.

THE CLERK: This is Case Number 12CR3046-1, United States of America versus Randy Feauto. Counsel, please state your appearance.

MR. WEHDE: Shawn Wehde for the government.

MR. MCGOUGH: Jim McGough for the defendant.

THE COURT: Good morning. Mr. McGough, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. MCGOUGH: I have, Your Honor.

THE COURT: And do you agree that the total offense level is 33, criminal history category 3, the advisory United States Sentencing Guideline range is 168 to 210 months, there's a mandatory minimum 120-month sentence but that's doubled by virtue of the Title 21, section 851 enhancement for the prior state court drug conviction, and so the mandatory minimum becomes 240 months and that trumps the advisory guideline range of 168 to 210 months? Do you agree with that?

MR. MCGOUGH: I do.

THE COURT: Do you have any objections to the presentence report that need to be ruled upon?

MR. MCGOUGH: No, Your Honor.

THE COURT: Would you like to offer your exhibits into evidence at this time? [3]

MR. MCGOUGH: I would, Judge, move to offer Defendant's Exhibits A through D which are the

character letters previously provided to the Court and to the government.

* * * *

(Defendant Exhibits A through D were offered.)

* * * *

THE COURT: Any objection?

MR. WEHDE: No, Your Honor.

THE COURT: A through D are received.

* * * *

(Defendant Exhibits A through D were admitted.)

* * * *

THE COURT: Do you agree with those calculations, Mr. Wehde?

MR. WEHDE: Yes.

THE COURT: And is the United States making a substantial assistance motion?

MR. WEHDE: Yes, we are.

THE COURT: Okay. Would you like to make that at this time?

MR. WEHDE: Yes, Your Honor. In this matter United States moves under United States Sentencing Guideline 5K1.1 and 18 United States Code, section 3553(e) for a downward departure for the defendant's having provided substantial assistance. We are recommending 10 percent reduction in this particular case, [4] and I'll note what the defendant has done and some of the reasons for the consideration of a 10 percent reduction.

Mr. Feauto – the primary work that Mr. Feauto was involved in for which he's granted the motion by

the government is his work in an active capacity. Shortly after his arrest in this case, he agreed to cooperate, and he made several controlled buys in a large Fort Dodge investigation. And by my count he did seven actual buys. He was wired up to make controlled contacts or attempted buys 10 or 12 times, and then there were a number of controlled phone calls that were made to help set up those particular buys.

He made buys directly from four defendants, Ms. Larson, Mr. Kloss, Mr. Greenfield, and Mr. Garrett. Mr. Greenfield and Mr. Garrett were together on their controlled purchase. And ultimately the source for all those individuals or the primary source for all those individuals, Tim Gailey, also showed up during or before or after a number of those buys, and so there was – at least surveillance was able to observe Mr. Gailey being involved, and there was talk with the controlled buys or during the controlled buys that linked Mr. Gailey as the source.

All five of those people were charged. That information was then used in search warrants at a number of places after all those buys, Mr. Gailey's construction company, his car, his residence, and then the residences of the [5] individuals. Only two of those search warrants were of any real value. The construction business, some methamphetamine was seized from Mr. Gailey, Mr. Kloss, and a thir – another party who's been charged by the name of Patrick – Waylon Patrick, and there was some additional evidence found at Ms. Larson's and Mr. Gailey's house.

The last two search warrants at Kloss and Greenfield's, by the time those were done a few days

later, everybody knew what was going on, and so there was nothing found there.

The – while Mr. Feauto was out, near the end there were some difficulties with him, and it was determined for a variety of reasons and information that he was using and buying and selling small quantities of methamphetamine while he was working with law enforcement. He was confronted about this after he was revoked in – off his pretrial release in his debriefing, and he admitted doing some of that buying and selling on the side, so to speak.

And he also debriefed about his – about who he had been dealing with and why he was able to deal with these individuals which we kind of knew about the five already, and he also talked about some other people.

None of the information that he talked about in regards to other people has been used outside of what was in this – the case that I've described. [6]

There is the – there is – a number of those have already been prosecuted. Some of it was fairly dated. Some of them are too small or too dated to be investigated or too remote to be corroborated at least at this time. But there are three targets within there that are continuing to be targets for the government. But we already knew of them as targets at that time.

So – and then about a month after we debriefed Mr. Feauto, we happened to debrief Mr. Greenfield. Now, Mr. Greenfield disclosed some further as I would call it obstructive conduct that we were not aware of until that point, and that was that at that time Mr. Feauto had – there was a scheduled buy, and the actual buy took place on October 31 of 2012. The target was Mr. – Mr. Greenfield and Mr. Garrett were the

targets. And it was learned through Mr. Greenfield that Mr. Feauto approached them which we determined to be outside law enforcement's authority or presence and set up kind of a side deal in which the government got ripped off.

Essentially we were buying an ounce of methamphetamine. The two targets, Mr. Garrett and Mr. Greenfield, came up with some MSM and prepared it so that Mr. Feauto when he got there for the controlled buy and unbeknownst to law enforcement cut the – cut the one ounce with one ounce of meth, one ounce of MSM cut, and then they left the other half ounce there uncut, and that was split between [7] Mr. Garrett and Mr. Greenfield taking a quarter ounce and Mr. Feauto taking a quarter ounce that he retrieved a day or two later from them.

Lack of a better way to describe it, it was what probably often does happen when a middleman's ripping off one side or the other, but in this case the middleman was working with law enforcement, and the people that got ripped off are law enforcement.

The lab reports when they came back provided some corroboration of that because most of the buys in this case that was Tim Gailey's methamphetamine that was going to these various people, Larson, Kloss, et cetera, was around 85, 90 percent. The stuff that came on the October 31 buy was 47 percent which would indicate that it was half the quality.

Mr. Garrett has been recently arrested, but we have not heard his side of the story on this, but we did confront – I mean, essentially I was requested by the U.S. attorney – when we were considering this, I was

requested to reinterview Mr. Feauto to see what his position was on whether that had happened or not.

We did that yesterday, and he did admit that what Mr. Greenfield had described was accurate. And when asked – I'll be honest. When I asked him why he didn't tell us during the debriefing, he said that he was scared that he would get into more trouble and didn't tell us. [8]

Based on all that, we are recommending 10 percent and making a motion. I will indicate to the Court it was a rather animated discussion as to whether to make a motion or not. There was a number of people including the U.S. attorney were very – again, the word I think is reluctantly giving a motion because we do recognize that people do use drugs when we work with them active. We try to prevent that. We try to do it a number of ways. It often happens, and then it has to be dealt with. We do recognize that when people use sometimes they're going to be – I guess the next level is they're buying and selling or they're trading to keep their habit going and to keep their contacts up. That has happened. Obviously that's more serious and more significant.

But this is another level beyond that in the sense of that not only did he do that, but he also ripped – basically ripped off – didn't follow orders, didn't do it with authorization, and basically ripped off the police that he was going to be cooperating or who he agreed to cooperate with.

It presents two problems. One, obviously impeachment. You know, it's disclosed, and, therefore, he is – it provides good fodder for cross-examination should he be a witness. I mean, I hope I never have to

live through that. Granted, though, in this case all codefendants were captured. There was certainly a lot of evidence helped – help – largely helped to be created or obtained by Mr. Feauto's actions. There's [9] surveillance. There's comments. There's dope in hand and then obviously cooperators flipping on cooperators. So there was quite a bit of evidence.

It has not resulted in anybody attacking the case and demanding better deals for it or going to trial or threatening to go to trial. Granted, there are two people that are remaining. One hasn't been captured, and one was recently captured. But all have confessed to date with the exception of the one who's a fugitive. So I do not anticipate in this case having any trials or things of that nature coming out of it.

The other aspect of it is is that obviously we don't want to set a precedent that individuals who work with law enforcement can go against law enforcement, rip off law enforcement, and still get the benefits of their cooperation to a full extent.

I'd have to say the other side of the question then is then why are we making a motion, and I'm going to indicate to the Court that there's been cases I've been before this Court and I've said we're not – you know, somebody made a buy, somebody made an intro, but this is what they did over here, maybe not exactly what was described here, but we're not making a motion because this person damaged cases, did this, that, or the other, and so we're not making the motion.

Where this case is a little bit different is this individual made a big case and did quite a bit of work. As I [10] contact – probably 15 to 20 recorded phone calls, 10 to 12 wired-up one-on-one contacts, and then

7 actual controlled buys as well as describing his previous obtaining of methamphetamine from these individuals on a regular basis for the last number of years.

That in mind, reluctantly we are making the motion because we think we should grant it to some degree but mitigate it to some degree. We do have some precedent with that in other cases that I have been involved in including a case that involved the defendant's sister a number of years ago where we had bad conduct and we also had good conduct and we were able to make a case out of that or case or two out of that case. I don't remember all the specifics, but we did do a mitigated motion of something similar in that case.

Granted, he's done quite a lot in this case. She didn't do quite as much in that case as I recall. But that's the reason for the motions.

I think that's essentially as I would describe it the good, the bad, and the ugly out of this.

Rule 35 possibilities, yes, but because of his impeachment problems, I don't know how valuable that will be. There are some targets out there that he did talk about. But that is, I think, speculative at this point to determine whether or not that that would be something – first of all, whether we'd make those cases and, second of all, whether we would rely [11] upon him in knowing that he would have to be subject to this kind of impeachment information or this impeachment cross-examination in the future. If you have any further questions, I'd be happy to answer them.

THE COURT: Do you have a sense of what the recommendation would have been had he not set up this side deal?

MR. WEHDE: That's a little bit speculative in the sense of that how we would use him in regards to other cases and future cases. That I've already talked to.

But with regard to what he's done, I would suspect, Judge – and this is just an estimation from my point – it'd be somewhere around 50 percent. Because of what he did and the exclusive nature of what he did, sometimes we have two or three people making buys. I mean, we got 90 percent of the evidence in this case from his actions.

THE COURT: So he'd really be in the top tier, how ever you want to define it –

MR. WEHDE: Yes.

THE COURT: – of cooperators, but you've got this huge problem of the obstructive conduct and the side deal.

MR. WEHDE: Yes.

THE COURT: Right. I don't have any more questions for you. Thank you, Mr. Wehde.

What do you think, Mr. McGough? It's an unusual situation. [12]

MR. MCGOUGH: It is. Judge, he was – as the government indicated, he got out on pretrial release. He was doing this active work; okay? So he tests dirty, comes in, and is held.

Now, a lot of times in these kind of situations somebody's doing some active work, maybe they test dirty, but they still have value for law enforcement.

Then we can work out a deal with the government let's get the person into treatment, let's get them the services they need, and let's see if we can rehabilitate them and get them back out there and get the active cooperation.

That didn't happen in Mr. Feauto's case because the government had some of this information at that time that not only was he using, but also we think that he was also obtaining and distributing at that time. So some of this information, maybe the specifics of the Greenfield deal didn't come out until within the last month, but the government knew some of those specifics then.

And so basically a cap was put on the defendant's cooperation at that point. So I think he suffered from his own behavior at that time by him not being in a position anymore where he could continue to cooperate; okay?

So then that led to some additional proffers because now he's in custody, now we know where he is, now let's continue at least the intel. side of it. So that continued some [13] proffers, and that started and continued the negotiations between us and the government in reaching a resolution of the case.

And the other thing that Mr. Feauto's behavior affected him or how it affected him on this case is in negotiating with the government on the 851. The government made it very clear because not only was he testing dirty when he was actively cooperating but we also believe that he was doing stuff on his own that wasn't authorized – he was obtaining methamphetamine; he was distributing

methamphetamine – and so the 851 issue's not even open for discussion.

So again, that's a second way that he brought about his own – his behavior brought about serious and severe impacts on the way his case was handled.

THE COURT: Well, was there some discussion earlier about the government might waive the 851 enhancement?

MR. MCGOUGH: There was. There was. He had some –

THE COURT: What's your experience been about when they waive it and when they don't?

MR. MCGOUGH: Very rare. It's very, very rare in this district. But he did have some intelligence on some other cases. I don't want to get into too much specifics on that, but he did have some intel. on some other cases that the government was extremely interested in. And when he was – when he was originally arrested and appeared at his initial appearance, the [14] government and I had conversations about, look, we want to keep him out, I think he's got some active work, but the government also made it clear to us that he's got some real intel. that could help us on some pretty substantial cases, and the 851 may be in play.

So I understand the Court's point. It's unusual. It doesn't look like it's really an impact, but it ended up – it's our position that it did end up having an impact on this case because of his behavior.

THE COURT: I just want to focus on the 851 enhancement. Are you saying that had he not engaged in this, for lack of a better term, what Mr. Wehde

called a side deal there's a substantial likelihood the government would have waived the 851 enhancement and his mandatory minimum would have been 120 months rather than 240 months? Is that what you're saying?

MR. MCGOUGH: I don't know that I can say that. I think what I can say is at the time that he was held on the violation the government knew that there was other things going on. The government knew it wasn't just a simple act of he was using. The government knew at that point he was doing some of his own deals.

Now, the ins and outs, all of the details of the side deal weren't known until recently. But the government knew at that point that Feauto was doing his own – working off the [15] reservation, so to speak, and kind of doing his own thing.

And the government, as a result of that, told me two things. Number one, we don't care what you come up with. We worked with pretrial considerably in trying to come up with some – for a long period of time trying to come up with some kind of a treatment plan for him to get out because we knew he still had value. Law enforcement still wanted to work with him; at least some of them did. They thought he could do some more active work that could lead to other cases.

But government – when he got picked up, knowing that he was involved in some of these other deals, government made two things clear to me. Number one, they said we're not going to agree to him getting out, treatment or not treatment. We don't care. He's up to some other stuff, and we want to put an end to it. And number two, 851's not a conversation anymore.

So would there have been a substantial likelihood? I don't know. I know that it was a conversation that the government was willing to have with me, that they were having with me. But after he got held on the violation, they made it clear that they didn't want to hear any more about it, that it was going – he was going to have to eat off on the 851 or not or go to trial.

So it's our position it did have an impact at least in the negotiations. Practically did it? I don't know. All I can look at is how it was presented to me which was it's not part of [16] the conversation anymore.

So he's involved in the side deal, and by the government's accounts they – he leads them to four defendants which leads to the source so five cases. Search warrant from those five cases leads to a sixth defendant, so six cases he really makes. Mr. Wehde indicated that one of those six people are in the wind but the other five have either pled or they have a plea hearing scheduled. Doesn't appear that any of them are going to trial.

If it was a situation where Mr. Feauto's actions jeopardized the government's case, then I'd understand the hesitation on giving a motion and might even understand the recommendation that's been offered.

But the government's position on any of their cases, the six cases, the five that are apprehended defendants, the search warrants, the confessions, the scheduled change of plea hearings from not guilty to guilty and one that's currently waiting – that is scheduled. I think Mr. Wehde previously indicated that it was scheduled for yesterday and then it was continued till Friday. So I think all of the government's

cases have been resolved in a way that Mr. Feauto's behavior didn't jeopardize those cases.

Now, there's still precedential value; I get it. But from a valuation from the government to go from 50 percent or in that tier down to a 10 percent recommendation when none of their [17] cases were affected that were for all practical purposes created by the cooperation of Mr. Feauto doesn't make any sense to me. If they had to drop or negotiate differently those cases, then I'd understand their argument to say that he should be penalized for that. But that's not the case here.

As the courts recognize, there's certainly a unique situation. There should be some kind of penalty for what he did. I think there has been. I think him being held by his own actions and not being able to set up a treatment plan and get him back out there despite the fact that at least some law enforcement wanted him to continue to cooperate, I think that basically put a cap on what he could do.

I think there was other cases. I think the government knows that there was other cases that he could have made and other defendants that he could have had apprehended and prosecuted. That didn't happen.

So I think that there's been some penalty already. I think that if the Court takes the government at what they're saying that he would have been in this higher tier, he would have been in the 50 percent range, I'm asking the Court to consider a 35 percent range. I definitely don't think it should be any lower than a 35 percent range. And I think a 35 percent range amounts to a sentence of about 156 months which is about a 13-

year sentence which is still pretty substantial. You look back over his past record, the most he's ever gotten is really a [18] year in jail. His record is replete with issues regarding his addiction to drugs.

And unfortunately, not that it justifies it, but unfortunately, this is kind of the situation of you've got somebody who's got access to it and who has a drug problem. Sometimes they're not going to be able to control themselves and put themselves back in the way of life that they're accustomed to. So that's what we're asking the Court to consider.

THE COURT: Any reply, Mr. Wehde?

MR. WEHDE: No, Your Honor. I think . . .

THE COURT: What about the 851 enhancement? How was that affected in this case?

MR. WEHDE: Again, on a practical level, I don't know. It's a little bit speculative, but I think Mr. McGough characterized it fairly accurately, that it was on the table. It is not – as you know, it's not often on the table. It is on the table in this case. It was. And it was taken off the table at the time that he got revoked off his pretrial release based on, as Mr. McGough said, our knowledge that he was using and he was buying and selling on the side. Obviously at the time we made that decision we did not know about the side deal that I've described.

But it was based on his activities that have been described as buying and selling beyond just mere use and having troubles because there was a discussion. Mr. McGough is a very [19] effective advocate, and he was asking, you know – and there were more things that Mr. Feauto could do. Probably for many of the

same reasons for which he's in trouble with what he did, he's probably looked at as – most people probably didn't think he was working with the cops. He's such a con man, and I'm saying that in this context as a compliment that he's – he was able to – he could buy dope from a lot of people, and he had a lot of contacts and had over his past. And so there were other targets out there that he basically forgave or we forgave because of his conduct.

So it was on the table in regards to the – to this case for a variety of factors, mostly his cooperation, also his record, also his – what the offense was in regard – it was a simulated substance case and such. So all that was on the table, and he lost that because of his conduct.

THE COURT: Do you think you would have been more apt to waive the 851 notice because it was a simulated substance offense –

MR. WEHDE: Probably.

THE COURT: – rather than kind of a large-scale drug trafficking offense?

MR. WEHDE: Again, it's speculation, but I would – I would guess probably, yes.

THE COURT: And when you say it's on the table, I understand what that means. But unlike some negotiations where [20] you can meet halfway on an 851, it's kind of like pregnancy. You can't be partially pregnant. You're pregnant or you're not.

MR. WEHDE: Right.

THE COURT: 851 notice, if you waive it, his mandatory minimum is 10 years. If you don't waive it, it's 20 years. There's no –

MR. WEHDE: There's no real in-between.

THE COURT: – compromise in between.

MR. WEHDE: That is true.

THE COURT: So I'm wondering – and I realize it requires speculation on your part. But it sounds like the type of case where it would have been reasonable and doable for the government to waive the 851 notice. Of course, you might not have because, with all due respect, you do all that in secrecy. There's no policy on it. We never know – unlike a federal judge who has to state their reasons for sentencing, Department of Justice not only doesn't have to but doesn't give a reason why they either waive or file an 851 notice. That's all done in secrecy; right?

MR. WEHDE: Often. I guess the decision is made that way, yes. I think sometimes we've made of record why we have or haven't when there's a discussion at sentencing. I'm not saying in all cases by any means. But otherwise I think you're accurate with that.

THE COURT: Are you in a position to give me odds on [21] what you think, or that's just too speculative?

MR. WEHDE: I think it's pretty – it's relatively speculative here because we didn't get that close to it because when we found out the information was before we even debriefed him in regards to that, and we would have had to have known what his debriefing information was at that – that would have played a role in it as well and – in that regard.

It's very – it's a very difficult assessment to make at that time. Plus I'm actually trying to assess other people other than myself who are involved in that

decision process, and it's not just one – one person makes the decision, but there's input. If it was anything like the 5K discussion that we had in regards to this case, there was a lot of people on both sides on this in regards to it, and there's pluses and minuses to how it would have been evaluated.

THE COURT: Can I ask you this?

MR. WEHDE: Sure.

THE COURT: On the positive sides towards the government potentially waiving the 851 notice, the fact that he was cooperating was a positive.

MR. WEHDE: Would have been a factor, yes, yes.

THE COURT: And the fact that he was cooperating to the extent that the government might have made a 50 percent reduction which is incredibly rare, that's a very positive step towards potentially waiving the 851 notice. [22]

MR. WEHDE: Yes.

THE COURT: Other than the side dealing, were there any negatives that you're at liberty to disclose that would have weighed against the government waiving the 851 enhancement?

MR. WEHDE: Possibly, and that is the debriefing that we did conduct was a difficult debriefing. I wasn't involved in all. I was only involved in the outset of it, but I was also updated in regards to it, and it also dealt with – so he had a tough time admitting his use and dealing on the side. But he ultimately got to it without – but then didn't tell us about the side deal.

But the information that we were looking at – and Mr. McGough's kind of discussed and implied that there was some information regarding a cold case from

ten years before that we were interested in – that information turned out to be less than valuable, and we wouldn't have known that.

Basically the 851 would have been a discussion that would have been in part impacted by how valuable that information would have been in a couple of reasons. One, in a cold case like that which are usually fairly significant cases when you're even considering going back ten years or so in evaluating and using and trying to come up with evidence, you're going to look at it, and you gotta go in knowing that often even with information, even good information, you can't make a case. I mean, it takes a lot of things to fall right. [23]

But to see whether it would take us down a path, that did not turn out to be as valuable as anticipated. It essentially was not valuable. I mean, I shouldn't say it wasn't valuable. It was valuable at least to hear potential target, but it wasn't anything that we could use or do anything with. As the DCI agent said, it's – and he wasn't meaning this in a bad way. It's virtually useless because we can't corroborate it because it doesn't match up with this, this, and this. It isn't that it isn't true. It's just that we can't use it.

And so that may have had some impact on the 851 analysis because we were looking at he might be able to help us out on something that would not result in a prosecution immediately or that could only result in further investigation that may not even culminate with an arrest, and that would have been some of the things that we would have considered in regards to that.

That is the one thing that I could think of. But again, that is rather speculative in nature and how that would have impacted the analysis as well.

THE COURT: Okay. Thank you.

MR. MCGOUGH: Judge, may I respond to that?

THE COURT: Yes, sure.

MR. MCGOUGH: I understand what the government's saying, but in fairness to Mr. Feauto, the difficult proffer came after he violated. The government before we even scheduled [24] that proffer – because during the time he was on pretrial they were using him for active work, so we didn't do the formal proffer until after he was apprehended after the violation. And the formal – before we ever scheduled a formal proffer, the government had already decided that 851 was not open for discussion.

So when the Court asked are there negative factors that the government would have taken into consideration in determining the 851, that decision was already made before the difficult proffer. I just wanted to clarify that.

So that wouldn't have really been a consideration for the government because the government had already decided the 851 was not going to happen because of his behavior, not because he had a difficult proffer. That came later.

THE COURT: Do you disagree with that, Mr. Wehde?

MR. WEHDE: No, Your Honor, but I thought your question was assuming no bad conduct would we have gra – would we have done the 851, and I'm saying – again, we're getting speculative, would the proffer

have been as difficult if we wouldn't have had the bad conduct? That's speculative.

But I think the more – one of the more significant factors would have been how valuable the information regarding that cold case was or wasn't, and I don't think that changes whether he had the bad conduct or not. It just wasn't as valuable as we thought it might be. It still would have been [25] put in the analysis as to whether to do it, and I think some of the things you brought up earlier about the type of case it was, the 851 being a simulated case and he was cooperating, those are more – those are probably more important factors for the 851 analysis.

THE COURT: And this is really just kind of for my own edification, and if I'm treading on trade secrets, you be sure and just say you can't answer the question or pass the question. But is the government in a case where somebody's cooperating more likely to waive a second 851 enhancement than the first 851 enhancement?

MR. WEHDE: I'm doing kind of an analysis in my head, Your Honor. Clearly the second 851 is more often waived than the first when it exists. Some of what goes into that analysis is whether it's a true second or it's a third or a fourth which often happens.

But on a general – generally I think a second 851 is more often waived than the first itself. But I really am having a struggle to try and compare apples and oranges in that regard, so to speak, because – because the analysis with the first 851 or a sole 851 is usually based on some of the factors that we've discussed here.

Again, they're not quite the same analysis. I understand your question and what you're asking, but

I think it probably – the best answer I can give is probably a second [26] 851's easier or more often waived. But there may be other reasons that makes it easier or more often waived than not. So I —

THE COURT: Okay.

MR. WEHDE: I'm doing the best I can.

THE COURT: Sure.

MR. WEHDE: And it's – it's a little bit speculative.

THE COURT: Okay. I appreciate that.

Mr. McGough, anything else you'd like to add?

MR. MCGOUGH: No, Your Honor.

THE COURT: Okay. Mr. Feauto, you have the right to say anything to me you want to. You don't have to say anything. You have a right to remain silent. If you exercise your right to remain silent, I will not hold it against you in any way. If you'd like to say something, I'd be happy to hear what you have to say. Is there anything you'd like to say?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay.

MR. MCGOUGH: Judge, I do have one other issue.

THE COURT: Yes.

MR. MCGOUGH: He's asking for placement as a preference at Oxford. He's also asking for a suggestion or a recommendation to the RDAP program.

THE COURT: Okay. Anything else?

MR. WEHDE: No, Your Honor. [27]

MR. MCGOUGH: No, Your Honor.

THE COURT: Okay. In this case I find the total offense level is 33, criminal history category 3, so the advisory guideline range would be 168 to 210 months. However, there's a mandatory minimum – actually 10 years based on the drug quantity. That doubles to 20 years or 240 months based on the prior felony drug conviction in state court. So we start at a sentence of 240 months.

The government's made a substantial assistance motion which I'm granting. The big issue in the case is how much of a substantial assistance departure the defendant should receive. This is a – this is a tough case.

So I'm going to go through the factors. The timeliness of the defendant's assistance, I – you didn't really directly address that I don't believe, but I assume it's timely because the assistance was active buys, and you do that as it arises. So I assume that's timely.

Any injury suffered or danger or risk of injury to the defendant or his family, nothing specifically in the record, although potential – there's always more potential risk when there's active cooperation, although, on the other hand, law enforcement monitors that very carefully, so it reduces the risk. So I don't see that as a substantial factor.

The third factor – I usually go from the bottom – the nature and extent of the defendant's assistance, very high [28] in this case, seven actual buys, wired ten to twelve times for phone conversations, was responsible for the indictment of at least four or five defendants, helpful information on getting the search warrants. So active work is often held out not as a gold

standard but as the platinum standard, and so very, very high in terms of nature and extent of the assistance.

Truthfulness, completeness, and reliability, apparently he was truthful, complete, and reliable about his cooperation other than his side deal. But when confronted with it I guess as recently as yesterday from what I understand I've been told, he was truthful about it. I suspect if he hadn't been truthful yesterday we might not be here. The sentencing would have been over, and it would have been a 240-month sentence, end of story. The government probably wouldn't have made the motion. And had he hadn't come clean, I'd certainly be inclined to follow the government's 10 percent recommendation. But he did come clean, albeit very, very late in the game.

Then the first factor is my evaluation of the significance and usefulness of the defendant's assistance taking into consideration the government's evaluation of the assistance required. That's a little bit of a tough one because as Mr. McGough points out, while it was potentially an impeachment problem and it might have made Mr. Feauto less believable in front of a jury, everybody's either pled or indicated they're going to plead, so that hypothetical problem for the government [29] didn't arise.

Secondly, I'm not sure that would be such a huge problem for the government to overcome. They'd obviously be better off without it, but I'm not sure that would be that significant of a problem. Not helpful, but if the defendant appeared to be truthful on the other things, I think the fact that he ultimately told the

truth on his side dealing people could understand the side dealing because of his addiction. So I'm not sure it would be a huge problem.

And then we have this whole issue about the 851 which is, you know, somewhat speculative. But had the government waived the 851 enhancement in this case, we'd be starting at 120 months, and had the government recommended 50 percent, we'd be down at 60 months. Of course, there's no assurance the government would have waived the 851 enhancement, but there certainly seems to me to be, based on what I've been told by the lawyers, a reasonable probability. Matter of fact, probably I'd say pretty close to the greater weight of the evidence. By a preponderance of the evidence he might have – I can't say by a preponderance of the evidence he would have been given. I can say by a preponderance of the evidence he might have been given, so I'm going to hedge my bet too. I think Mr. Wehde said it best. It's just kind of speculative.

But he didn't get the 851 enhancement, and that's a decision that only the U.S. Attorney's Office can make. But I [30] just want to point out had he gotten it, we'd be looking at a sentence of 60 months. Even without the 851 enhancement, had he not engaged in the side deal and the government made a 50 percent recommendation, we'd be looking at a 120-month sentence. So I think probably the lawyers in the room, all three of us, agree that there has to be some penalty for this side dealing. We probably have three different views about how much that penalty should be.

I need to go back to you, Mr. Wehde, for a minute. You know, the – if you look at 5K1.1 and the precatory

language in subparagraph (a), the appropriate reduction shall be determined by the Court for reasons stated that may include but are not limited to consideration of the following, and then it's the five factors that I've talked about. Even though they say – even though the rule says – the guideline says may include but are not limited to, I'm not sure the circuit has ever approved anything but the five factors.

So what I'm getting at is it may be permissible for the government to make the determination on the side deal to give a motion or not to give a motion, but I wonder how I should factor it in in looking at the five factors.

The only – the only one that comes into play I think is on the first factor, my evaluation of the significance and usefulness of the defendant's assistance taking into consideration the government's evaluation of the assistance [31] required. And what I hear the government saying is that it made him a less desirable witness because he was involved in the side deal, but they actually never needed him as a witness. And if they do need him in the future, it would make him less desirable. It's a problem that the government would have to overcome. Are you also saying that it affects the second factor, the truthfulness, completeness, and reliability, because he ultimately was truthful about it?

MR. WEHDE: I think it does affect it. I think that he mitigated the – he mitigated the negativeness of that by coming clean after he dried out, so to speak, and after he was confronted. But I think that any time anybody does something – any time anybody lies or any time anybody does something to the degree that

he did in this case that there's always going to be a thought that there may be some unreliability. You wouldn't rely upon him as much as you would somebody that didn't do the activity.

Again, I don't know how far that plays into it when you don't – it's easier to know that when you have an ability to test that by putting him in front of people and questioning him, see how he withstands himself. I'll be honest: He's a good talker, so he could probably handle cross-examination fairly well in regards to – and again, I am giving that as a compliment, not as a detriment. I mean, he has the ability to talk himself out of trouble or talk himself out – explain [32] himself as to what he was doing and why he was doing it, and that may have been less a factor than you can . . .

THE COURT: But it might have made his testimony less reliable in a juror's eyes.

MR. WEHDE: True.

THE COURT: Yeah. Okay. Well, if you look back on the statistics over the last several – even going back five years – every year the sentencing commission publishes a statistical summary of the year in review. And the average drug-trafficking defendant who receives a substantial assistance motion going back over the last 5 years is usually somewhere between 45 and 47-point-something percent in terms of a substantial assistance motion. Of course, it's hard to know what an average cooperator is nationally. I've done sentencings in 4 districts, but there are 90 districts where I haven't done sentencings. But I would suspect by virtue of the fact that the government might have made a 50 percent recommendation that Mr. Wehde would concede that Mr. Feauto was well

beyond what the average cooperator would be certainly in this district because the average cooperator in this district maybe gets a 20 percent recommendation. Do you disagree with that?

MR. WEHDE: I don't know what the average. I might say 25 or 30, but again, that might be just my cases as opposed to the group that I deal with. I would concede – I would concede that he's greater than the average that I see. [33]

THE COURT: Okay. And it could be that. It could be 25 or 30 percent, I agree. Somewhere between 20 and 30 percent most likely. So while I sometimes follow the government's recommendation, sometimes I give less, but more often than not I guess I probably give more than what the government recommends. I gave a 60 percent reduction yesterday in a case where the government – I don't actually remember what they recommended, maybe 30 percent or 40 percent. I'm fairly confident that if we hadn't had this problem with the side dealing I would have given a 60 percent recommendation. So I'm just trying to figure out how much kind of penalty there is for the side dealing.

And so it's just a judgment call in balancing these 5K1.1 factors that we've gone through, but I'm going to impose a sentence of 132 months which is a 45 percent reduction. It's a difficult call, but I'm comfortable with that. It's more than double what the defendant would have received had the government waived the 851 enhancement and made a 50 percent recommendation and I had either followed it or given more. And even if the government hadn't waived the 851 enhancement which nobody knows because it is somewhat speculative, had the government made a 50

percent recommendation off the 240 months, I would have given more.

So in terms of just looking at what the kind of penalty is for the side dealing, I think I've properly taken that into account in analyzing the factors. [34]

So it's my judgment that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for 132 months. I'm going to recommend Oxford, Wisconsin, also recommend the 500-hour drug treatment program where you can earn up to a year off your sentence if you successfully complete it, although the average inmate last year earned about 8 months off their sentence.

When you're released from prison, you'll be placed on supervised release for 10 years on Count 1, 3 years on Count 4 to run concurrently.

While you're on supervised release, you'll have the standard conditions which include some obvious things like you can't possess or use any illegal drugs. You cannot possess a firearm, ammunition, destructive device, or dangerous weapon. You'll never be allowed to possess a firearm and ammunition unless you successfully petition the Bureau of Alcohol, Tobacco, Firearms, and Explosives to have your rights restored. You'll cooperate in the collection of a DNA sample.

You'll have the following special conditions while you're on supervised release. You'll participate and successfully complete a program for testing and treatment for substance abuse. You'll also participate in any mental health treatment and counselling recommended by your probation officer and take any lawfully prescribed medications.

While you're on supervised release, you're prohibited [35] from using alcohol and going to bars, taverns, and other establishments whose primary source of income is derived from the sale of alcohol. You'll need to obtain verifiable employment that would be preapproved by your probation officer. And finally you'll be subject to the standard search condition which means a United States probation officer can search your person, residence, automobile, personal property, computer, cellphone, camera, and the like if they have reasonable suspicion you're violating your supervised release.

You don't have the ability to pay a fine, so the fine is waived. There's a $200 special assessment which is due and owing. And you can pay that pursuant to the federal Bureau of Prisons' inmate financial responsibility program. You're remanded to the custody of the United States marshal to serve this sentence.

Just wanted to give you a heads-up that if you were to receive another felony drug offense and be sentenced in federal court, your mandatory minimum would be life. And that means, because there is no parole, you would die in a United States prison unless you join that super-exclusive club of people who get Presidential pardons. That club is very teeny.

There's an appeal waiver in this case which means you've given up your right to appeal the sentence that I've imposed unless the sentence that I imposed is illegal or unconstitutional. In those two very limited situations, you [36] would have a right to file a written notice of appeal. And you'd have to file that no later than 14 days from the date your judgment is filed. You

would need to file that with the clerk of our court. And if you can't afford to pay for a lawyer, pay the costs of an appeal, those costs will be paid on your behalf.

Mr. McGough, anything further on behalf of Mr. Feauto?

MR. MCGOUGH: No, Your Honor.

THE COURT: Okay. Thank you for your representation.

And, Mr. Wehde, anything further on behalf of the United States?

MR. WEHDE: No, Your Honor.

THE COURT: Okay. And thank you very much for how thoroughly you answered not only my questions but provided me with all the information that one could ever ask for regarding a very difficult substantial assistance issue. I certainly understand why the government only recommended 10 percent. My – I have no qualms with that recommendation. I just saw the factors differently, but it certainly was a reasonable recommendation, and I appreciate it. Thank you.

Good luck to you. We'll be in recess.

(The foregoing sentencing was concluded at 11:59 a.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH JAY PUTENSEN, Defendant. /	No. CR07-3008 TRANSCRIPT OF SENTENCING and SUPERVISED RELEASE REVOCATION

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, September 25, 2008, commencing at 2:10 [p].m.

APPEARANCES

For the Plaintiff:	KEVIN C. FLETCHER, ESQ. Assistant United States Attorney Terra Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	ALAN G. STOLER, ESQ. Suite 1004 1823 Harney Street Omaha, NE 68102
Also present:	Shane Moore, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101

[2]

THE COURT: Thank you. Please be seated. Good afternoon. This is United States versus Kenneth Jay Putensen, Criminal Number 07-3008. The defendant's personally present represented by Alan Stoler from Omaha. U.S. Attorney's Office is represented by Assistant U.S. Attorney Kevin Fletcher, and we're here for sentencing and also I guess if the parties agree to waive any notice requirements because I just found out about it today but we also have a petition for warrant or summons for offender under supervision. Why don't we defer that till after the sentencing.

Mr. Stoler, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. STOLER: I have, Your Honor.

THE COURT: And in this case the total offense level is 34, criminal history category 3, but because of 2 prior drug convictions and the section 851 enhancement, the guideline provision is a mandatory life sentence. Do you agree with that, Mr. Stoler?

MR. STOLER: Yes, Your Honor.

THE COURT: And, Mr. Fletcher, do you agree with those guideline calculations?

MR. FLETCHER: Yes, Your Honor.

THE COURT: And my understanding is that the U.S. Attorney's Office is making a – I guess you'd have to make both substantial assistance motions technically because of the [3] mandatory life sentence, but would you like to be heard on your motions?

MR. FLETCHER: Yes, Your Honor.

THE COURT: Thank you.

MR. FLETCHER: If it pleases the Court, the United States would make a United States guideline section 5K1.1 motion and a Title 18 United States Code section 3553(e) motion concerning the defendant's life sentence. The office is requesting that the life sentence be given of months of 470. I know the Court has – in the Burns case it was found 360, and you found more than 405 or 406 and we've – but recently you've generally been going 405 and 406. And our office it's my understanding is recommending – the 170 (sic) months is I think what we've been recommending, and that's what we're recommending in this case to be consistent with –

THE COURT: Your office has been consistent. I'm the one that's been somewhat inconsistent. It's kind of fluctuating.

MR. FLETCHER: So is the case law, Your Honor.

THE COURT: Yeah. Thank you. And I've pretty much kind of settled in on 406.

MR. FLETCHER: And I understand that. The other thing is that if it's all right I will now proceed with what his substantial assistance was.

THE COURT: Yes. Thank you. [4]

MR. FLETCHER: His substantial assistance is that the defendant debriefed back in September of 2007 pursuant to a federal proffer letter. After he was arrested in July of 2007 up in Minnesota, he obtained private counsel for a short period of time, and then eventually we were able through his state counsel up in Minnesota to get him a proffer letter and get him counsel.

The defendant was willing to cooperate and debriefed. When he got in trouble, he was on supervised release federally here for his prior federal drug conspiracy.

The defendant, what he did was he debriefed, told us what had been going on while he was on supervised release which included not only using meth but dealing and manufacturing in meth including the obtaining of pseudoephedrine pills, et cetera.

He had came to our attention in the investigation – I believe you've sentenced – well, I don't know if you've sentenced – I may be wrong, Your Honor. You may not have sentenced Mr. Roth, Mr. Johnson, or Mr. Wilson. I may be getting them confused. They've pled. I apologize.

The defendant covered his drug dealing and manufacturing and what he was doing including being caught up in the incident in Minnesota. And prior to Minnesota or was it right after – I forget; I apologize – there were search warrants done at his residence in Palo Alto County. I don't [5] remember – recall the town he lived in. I think it was Ruthven, but I could be incorrect. Might have been Mallard or Emmetsburg where they found other methamphetamine manufacturing items such as pseudoephedrine.

The defendant debriefed, and then he was placed in grand jury in December of 2007, and there we had him talk about what he was doing while he was on supervised release and had him talk about Doug Johnson, Mike Roth, and Gary Wilson from the winter of 2005 through February of '07 was his contact with them. Those individuals were involved in a meth

distribution and manufacturing conspiracy, and he knew them and was involved with them.

He discussed the time frame, number of cooks, the quantity of meth per cook, and the pills per cook and the location of the cooks. And those were important because we had not indicted them yet. We had lots of evidence of search warrants, cooperators, and those kinds of things against those three individuals. But the defendant's information tied in with he would also provide them pills and help with the cook, and they kind of helped him.

So he was able to pinpoint times and some of the quantities, and the one location was a cabin that Mike Roth used that's pretty unique, and we were able to corroborate that based upon the physical evidence we already had.

His testimony was used then to indict those three [6] individuals, but he was not the only reason they were indicted.

The defendant also talked about – I'll call them a target – one individual whose source is our target, and this is somebody up in the Lakes area that we're working. His information was given, and it's somebody that we knew about, and we've been able – because of what we knew, he corroborated what we knew, but it hasn't led anywhere yet. And hopefully he will be useful in the future. That's why we're also going to tell you he's a Rule 35 possibility.

And the significance of his test – excuse me, of his assistance was helping us indict those three individuals and the items I just discussed about per cook, time, quantity, and we were able to corroborate his information because of the physical evidence from

those search warrants against those people and other cooperators in that case. But like I – once again, he wasn't the only reason we indicted them.

Truthfulness, completeness, reliability, okay. We were able to corroborate his testimony, like I said, Your Honor, because of the physical evidence of other cooperators.

I'm not aware of any injury, danger, or risk of injury to his family.

In regards to timeliness, he was arrested in Minnesota on a state charge, and then there were search warrants right before or right after in Palo Alto County. About a week later he contacted law enforcement, said he wanted to cooperate [7] because when he was arrested on the 20 – on the 19th of July, he didn't want to talk or cooperate. And the defendant's been in jail then, federal custody, since July of 2007.

And I believe that's everything I have. I'd be glad to answer any questions the Court may have, Your Honor. And we're recommending 10 percent off of that.

THE COURT: The only question I have is you mentioned the three individuals, Johnson, Roth, and Wilson.

MR. FLETCHER: Yes, sir.

THE COURT: And then when I was reviewing the presentence report, there was a fourth individual indicted in the same case number, the 08-4006-MWB case, and that's Philip Schurke, S-c-h-u-r-k-e.

Did Mr. Putensen provide any information with regard to Schurke?

MR. FLETCHER: I didn't put it in here, and my memory as jaded as it can be also and also after the trial, I'm not doing real well today, Judge, just kind of tired like I'm sure you are, is I don't think he talked about Schurke. Schurke was somebody that worked for Roth, and if he did know of him, I don't think it was anything we didn't already know. But my initial reaction is no, Your Honor.

THE COURT: Okay. Thank you.

Mr. Stoler, would you like to comment on Mr. Putensen's substantial assistance? [8]

MR. STOLER: Yes, if I could, Your Honor. I think Mr. Fletcher's accurately portrayed the amount of cooperation that he's done except for the history as far as Mr. Putensen, he was in custody in state court. He was accurate that he did seek representation of counsel and wanted to then enter into cooperation with the government. He did sign a proffer letter. I think it was in early September. I didn't represent him originally. He was represented by Mr. Denne and did a proffer. They actually went to Minnesota to visit with him and to get the information that he first supplied to law enforcement. I think that was in early September of 2007.

He was also willing to act as a – do active cooperation, and efforts were made to try to accomplish that. The practical problem was that he was in state custody in Minnesota and he had the problem with the supervised release violation that was going to be filed here in Iowa, in the Northern District of Iowa, so he didn't actually come into our custody to Iowa until some time – I think it was late December of 2007. And we could not make arrangements to get him

released to do active cooperation. Obviously his situation was such that the government indicated that they would oppose a release to do that active cooperation.

So from a practical standpoint, he didn't do active, but he was willing and would have been able to do active cooperation because the people he was supplying information on [9] were still actively involved in distributing and manufacturing methamphetamine.

THE COURT: Well, do you think I can actually consider 4 that under the 5K1.1 factors? And if so, which factor would it fall under? I would have if I could have?

MR. STOLER: I guess the willingness to be able to do so had the circ – again, if he didn't have the supervised release violation and the government not opposing that, there were some efforts made to try to work that out with the government and through the pretrial service officer. Mr. Sturdevant was contacted and participated in those discussions. But it just became a practical impossibility I guess.

THE COURT: Okay. But which of the factors – I mean, I don't think it comes under any, but if it does, I'd like to know which factor you think it comes under so I can reconsider my view.

MR. STOLER: Well, I would submit that under the willingness to cooperate and the timeliness, it could be looked at from that standpoint that he would be willing to engage in active cooperation on behalf of the government to be considered under that provision under 5K.

The other matter that came up, there was I think some additional clarification that needed to be done and additional information because of – I think of timing on the first [10] proffer. He didn't complete all the information that he had and the details of what he had. So prior to his grand jury testimony, there was actually another proffer that was done here in Sioux City, Iowa, once he came into federal custody.

If you notice, he came in under – I think it was a complaint that was filed because we had to get him into – there had to be something to take him out of state custody in Minnesota to bring him to Iowa.

So when that was accomplished, he did another proffer that went on for at least – my recollection, at least over two hours that he supplied additional information right prior to when he went into the grand jury to give testimony.

There were other individuals he supplied information on that was not the subject matter of the grand jury testimony, but it was more of background information and historical information as well as those individuals that were currently involved in distributing in the Lakes area here in Iowa. So he did – he proffered twice I would submit to the Court as part of his ongoing cooperation.

When we look at timeliness as far as a factor, I would submit that this was prior to indictment. We had to go through an indictment simply because of the process of getting him in to federal custody here in Iowa. Otherwise we had talked about doing actually an information to avoid the time and trouble for the government, but because of the status in another [11] jurisdiction, they needed to indict him to bring him in

on writ. Couldn't bring him in on a writ with just an information.

So that was I think to his credit and should be considered under the factors under 5K as to reasons for a departure, that he was extremely timely immediately or soon after his arrest on a matter in the Minnesota area. He made contacts and sought counsel and signed the proffer to go forward and provide that information. So I think that's a factor to be considered also by the Court as to that standpoint.

THE COURT: Mr. Fletcher, how would you characterize Mr. Putensen's timeliness?

MR. FLETCHER: He didn't want to, first of all, cooperate. And then he's sitting in jail for a while. He did. Like I said, it was just okay. And I agree with the Court that I don't think you can consider willingness to cooperate. That's our position, Your Honor.

THE COURT: Anything else you'd like to add, Mr. Stoler?

MR. STOLER: Not as far as the cooperation. I do want to address the issue of life – the calculation as to life.

THE COURT: Okay. Why don't we take that up.

MR. STOLER: I'm familiar with the cases, too, that have fluctuated as to how you calculate life, and I think in this instance what I would ask the Court to look at is what this gentleman's life expectancy is. He's 42 years old. And he's [12] been in custody since July of '07 on this c – or on a case related to this case.

And looking at a gentleman with – that's currently 42 years of age, I would submit that based upon his history, his medical situation, that he served at least 8

years in custody since he was 16 years of age. At least 8 years out of the last 24 he's served in custody, that somebody of this – somebody such as Mr. Putensen probably has a life expectancy of probably about 30 years. I think the actual calculations for life expectancy for males is somewhere around 72, 73 years as an average life expectancy.

THE COURT: Actually I think it's higher than that. I think it's 76 because I've actually looked at this issue in the past of whether I ought to consider the life expectancy, and I've decided not to do that. But I've certainly looked at it very carefully and given it a lot of thought, and I've decided at least in the past not to do it.

MR. STOLER: Well, and since it is an amorphous figure that we're trying to work with as to what a life sentence would mean based upon —

THE COURT: Well, isn't 406 a reasonable compromise? I mean, you know, I guess there's a reported decision out there affirming me at 360. And I did do some cases where I said 3 – you know, life equals 360. But as I had an opportunity to think about it, I picked 406 because the highest guideline range in [13] the advisory United States Sentencing Guidelines is 405 to life. And that's why I've kind of settled in on 406.

It seems to me 360 is inappropriate because there's a 405-to-life guideline range, and 360 is actually the lowest range that includes a life sentence I believe, 360 to life.

So kind of after doing unfortunately a number of life sentences and having to pick a starting point for what life means, it seems to me the most logical one

and really the one that's most generous to the defendant that makes – that also makes the most sense to me is one month greater than the maximum monthly range mentioned in the guidelines, and that would be 405 months. One month greater is 406 months. And I'm just telling you the rationale of why I've selected it. And I have not been entirely consistent. The U.S. Attorney's Office has. I think every time this issue has come up during my 14-plus years now, they've taken the position that it's 470.

So why is 406 inappropriate?

MR. STOLER: Well, in looking at the guidelines, the highest guidelines would be 360 to life. The 405 is a cap that's indicated as a number of years or as a number of months as far as ultimate sentence. The highest range is 360 to life. There isn't a 405 to life. There's a 360 to life as to the range, so looking at the bottom end of a guideline sentence that covers a maximum up to life, I looked at the 360 as the starting point to be looked at from that type of a sentencing range. [14]

THE COURT: Well, yeah. I guess the 405 is the high end of the highest range that doesn't include a life sentence. Would that be right?

MR. STOLER: That's correct.

THE COURT: Well, why would it be fair to go to the high end of the guideline r – let's say you had a total offense level 39, criminal history category 3 and maybe you thought the criminal history was overrepresented – I'm sorry, underrepresented but not substantially underrepresented so you didn't do a upward departure, but for whatever reason there were aggravating factors maybe under the 3553(a) analysis

and you would go to the high end of the guideline range of 405 months. Why would it be fair then when somebody has a mandatory life sentence to turn around and use 360 as life which is 45 months less than somebody who got a within-range guideline sentence that did not include life? Are you tracking me?

MR. STOLER: I'm tracking you, and it's difficult to argue when we're talking about ranges of how you calculate a sentence that is a number of months. The example that you gave, maybe in the situation the person went to trial, had a significant criminal history that wasn't taken into account as you've described, and because of those types of factors you – Court felt that it was appropriate to give the high end of the guideline range.

I haven't seen in a case that I've been involved in [15] that involves a plea and a cooperator that avoids a trial and avoids all that's attendant to that that would be sentenced at the high end of a guideline range based upon those factors.

THE COURT: Well, I have sentenced cooperators at the high end of the guideline range before, not very often, but I've certainly done it, you know, more than a handful of times.

Anything else you'd like to add?

MR. STOLER: Not as to that issue, no.

THE COURT: Mr. Fletcher, anything else you'd like to add?

MR. FLETCHER: No, Your Honor.

THE COURT: Mr. Putensen, you have the right to say anything to me you want to before I impose

sentence. You don't have to say anything. You have a Fifth Amendment right under the United States Constitution to remain silent. If you exercise your right to remain silent, I cannot and will not hold that against you in any way. But if you'd like to say something, I'd be happy to hear from you. Is there anything you'd like to say?

THE DEFENDANT: Yes, Your Honor. I just wanted to say how ashamed —

THE COURT: Can you move that microphone a little bit closer? Maybe Mr. Stoler could assist you. Thank you.

THE DEFENDANT: I want to tell you how much I'm ashamed of what I've done to society, against society again. [16] I'm – I can't believe that I got wrapped up into this stuff again. I was doing good. I got out in 2002, the end of 2002. I made it 2003, 2004. I had my medical – I've —

THE COURT: know you have the cluster headache problem.

THE DEFENDANT: Yeah, I have cluster headaches, and I've used that stuff because it always prevented the next one. And most of the medicines that I've been on for that is like Ergotamine and caffeine and things that really shrink up your veins. They had to check my fingers and toes every two days to make sure I wasn't getting gangrene and stuff like that. The prednisone steroids and stuff I was on, it was just too hard on me. I had a doctor tell me I shouldn't even be alive all the prednisone I took for these headaches.

And I'm not going to lie to you. I'm not saying I wouldn't have had my addiction anyway, but I think in my own heart that it does weigh something in, you know, from my heart. I know that I – I don't think I would have been into it if I would have been able to get my shots.

I went to Mason City in 2003 and got a shot, and I went to Sioux Falls, South Dakota, in 2004 and got a shot, and they last for 12 to 18 months at a time. That's how long the nerve blocks – they last. They shoot it in my spinal cord for a nerve block. And I went back this last time, and they told me each time you go it's three or four thousand dollars, and I [17] couldn't afford it, and they told me that the woman that did it there at Sioux Falls wasn't there anymore and they wouldn't have helped me anyway because I never paid my bill, and I just couldn't afford it.

Like I said, I just – I can't believe it. This is just – I'm flabbergasted myself. That's I guess how the evilness of that drug comes over people. I mean, it's – my family, they're supposed to be here at three o'clock because that's what time we thought this was going to be. And I'm just ashamed. I can't – you know, I'm ashamed for my family because they gotta live in a town now that knows I was doing something like that in our community and my kids in school. I just can't believe I got wrapped up into it again, Judge.

THE COURT: Yeah. And I gave you a big break on that Rule 35(b) motion. You know, I think I cut your sentence from 240 months down to 80 months as I recall.

THE DEFENDANT: I know. You did. You did.

THE COURT: But you're an addict so . . .

THE DEFENDANT: I know it, and having the headaches compound it. Just – it's just too much for me to handle I guess, and all the people that are still doing that stuff around my area, I lost my business because everybody that I hired from job service was doing the drug that they showed up to work for me, and I fought that. I mean, for three years they were doing it around me. I didn't do it. It didn't matter to me that they [18] were doing it, but it didn't hurt me because I didn't do it.

But, you know, I don't know how I'm ever even going to make this up to society let alone my family because I care about them so much. And they know that I was a person that they wanted – when I got out of prison, federal prison, in 2002, I came home, and I was the person that they wanted at home. I wasn't doing the drugs. I wasn't doing none of that.

And I just – I don't know how it happens. Just one day I'm starting doing the shit again. I don't understand it. I just – no matter what, I mean, she waited for me for seven years, and I got out, and she was still there, the kids and her. They waited for me. I opened up Christmas presents for six years that I was gone. I can't believe I'd do this to them.

I don't know how it happened except that I wanted – I knew it took away my thing for headaches. You know, I've always been real healthy. I've got all my teeth, and I've done the stuff since I was 14. My dad used to beat me and my mom. He'd hit us in the back of the head and stuff because it wouldn't show when I was 14 years old, and I think that's why it crushed the occipital nerves that they do the nerve block on now. And it helps me with my headaches. And my mom had

the same headaches, and she was in mental institutions her whole life, in and out, because she had these headaches the same as I got them, and I think it was from my dad beating us.

One morning I went to school on the bus, and he beat [19] me black and blue, so I ran from the bus stop to social services, and I turned him in, and they put me in a foster home. They took pictures of my body, and he was – you know, both my parents died while I was in federal prison, and I don't hold that against him for some reason. I don't know. My dad loved me. My stepdad loved me. I know he did, and I know I caused a lot of problems, but I don't think I deserve to be beat that bad. I'm just so sorry. That's all that I have.

THE COURT: Okay. Thank you, Mr. Putensen. I hope you understand that my hands are relatively tied. I can't just give you the sentence I'd like to give you. I have to follow the law and the procedures, and I intend to do that. But I'm very sorry about the fact that your parents passed away while you were in federal prison. And I'm sorry you're back in front of me again. I know you didn't want to be.

And I understand that it's driven by your addiction. I do understand that. And I just wish Congress understood it a little better so that we wouldn't take these addiction problems and criminalize them like we have with these heavy-duty mandatory minimums. But I have to follow the law whether I like it or not.

Mr. Stoler, anything else you'd like to add?

MR. STOLER: No, Your Honor.

THE COURT: Mr. Fletcher, anything else you'd like to add? [20]

MR. FLETCHER: No, Your Honor. Thank you.

THE COURT: Okay. In this case I find the total offense level is 34, criminal history category 3, but there's a mandatory minimum life sentence due to the 2 prior drug convictions. And the U.S. Attorney's Office has made both substantial assistance motions which allow me to go below the mandatory minimum of a life sentence.

I find that the cooperation was relatively timely but certainly not, you know, at the top of the list in terms of timeliness.

I find it was truthful, complete, and reliable. Those are very important. I find that it was important in indicting three individuals and in corroborating other information.

I also find that your substantial assistance was not only complete and reliable but very detailed. You talked about the time frame, the quantity of pills, the location of the particular cabin used by Mr. Roth and that all of this information was valuable and of great assistance to the government in indicting the three individuals. That would be Johnson, Roth, and Wilson, although I understand the government also had other evidence that they could have used, and I'm not finding that your evidence was solely responsible for the indictment, but it was obviously of great value to the United States.

I understand that you not only debriefed but you also [21] testified in front of the grand jury.

With regard to your ready, willing, but not able to cooperate, I don't think I can give that any weight under the 5K1.1 factors, and I'm not. It seems to me the fact of the matter is while you might have been ready and willing, you weren't able to, and the reason you weren't able to was all of your own making. You know, you violated your supervised release, and the U.S. Attorney's Office was well within its discretion to say they're not going to release you.

Mr. Stoler, those are kind of my findings in terms of the 5K1.1 factors. I don't have any reason to disagree with the government's evaluation of the significance and usefulness of the defendant's usefulness. Matter of fact, I've adopted really exactly what Mr. Fletcher told me. I have some disagreement with their recommendation of 10 percent, but I don't believe I asked you directly what your view would be as to the appropriate percentage reduction.

MR. STOLER: Your Honor, we recently had this same type of discussion on a similar-type case as far as the amount of cooperation. And again, there's the hook out there that there's a chance for a Rule 35 and hopefully obviously for Mr. Putensen's sake that that occurs.

I still subscribe to the belief that when one does what one – what Mr. Putensen has done in this case that a threshold of a 50 percent departure is appropriate and should be [22] considered.

I know the last case that I had with you we had similar circumstances, and I think the Court imposed a sentence that was a reduction of a 33 percent reduction. I hate to use percentages as such, but I think it's the only measure that we really have to use.

And I would urge the Court to consider somewhere in the range between the 33 percent and the 50 percent reduction, Your Honor.

THE COURT: Mr. Fletcher, anything else you'd like to add?

MR. FLETCHER: No, Your Honor.

THE COURT: Here's kind of my dilemma. Post Gall versus United States, I still think the circuit has this requirement that in order to do a 50 percent reduction it has to be extraordinary. Now, whether in light of Gall which is really on a different issue – and that would be application of the Title 18, 3553(a) factors – they would still require extraordinary substantial assistance in order to justify a 50 percent reduction, I think it's very much an open question. But I have to follow the law as it is, not what I hope it will become.

And so what I am willing to say is that if there was no extraordinary requirement I would easily do a 50 percent reduction in this case. But because I consider myself – well, I am bound by Eighth Circuit precedent, so until the law [23] changes – and maybe this case would be the appeal that might change the law – I consider myself bound by this extraordinary requirement, and I don't find that Mr. Putensen's substantial assistance in this case, while significant, while very significant, I don't find that it meets the extraordinary requirement.

So based on my evaluation of the 5K1.1 factors, particularly regarding the truthfulness, completeness, reliability – and I would add I think contained within that the specificity that Mr. Putensen provided here with regard to the time frame, the quantity of pills, the

location, this unusual cabin location, the fact that U.S. Attorney's Office was able to corroborate other information through Mr. Putensen's testimony and we therefore know it's completely truthful and reliable, his relatively positive timeliness in terms of his cooperation although not as timely as others and the nature and extent of the defendant's assistance, taking into consideration all of those factors and the evaluation of the significance and usefulness, I'm going to reduce your sentence by 35 percent.

I'm going to go off the 406-month figure for the reasons I've already indicated on the record. And so I'm going to reduce your sentence from 406 months down to 264 months.

Again, let me reiterate that if I wasn't bound by the extraordinary requirement to go to 50 percent I would try and align myself with my understanding of most of our sister [24] districts where what Mr. Putensen did would be enough to warrant a 50 percent reduction.

So it's my judgment that you're hereby committed to the custody of the Bureau of Prisons to be imprisoned for a total of 264 months.

You know, I'm not going to make any findings under 3553(a) because I don't think they apply in this case. Maybe that's error. Maybe it isn't. But my understanding is when there's a mandatory minimum you can't look at the 3553(a) factors. So I'm unwilling to say that this sentence is sufficient but not greater than necessary. In my view it's higher, so it is greater than necessary, but because of existing Eighth Circuit law, I'm not able to apply the 3553(a) factors, so I'm not going to create a sham and state that I've applied

them. I haven't applied them. If I had applied them, I'd wind up with a sentence that would be lower than the sentence I've given.

I'm going to recommend the 500-hour drug treatment program.

Is there a facility you'd like me to designate?

THE DEFENDANT: Somewhere where they got a hospital I guess to give me my nerve blocks.

THE COURT: Yeah. Why don't I recommend Rochester, Minnesota, because that's the closest medical facility —

THE DEFENDANT: Yeah, that'd be fine. [25]

THE COURT: – to your residence. Upon release from imprisonment, you'll be placed on supervised release for ten years. While you're on supervised release, you can't use or possess any illegal drugs. You can't possess any firearm, ammunition, or other destructive device or dangerous weapon. You'll cooperate in the collection of a DNA sample. You already know this, but you'll never be allowed to possess a firearm or ammunition unless you obtain restoration of your rights by filing a petition with the Bureau of Alcohol, Tobacco, and Firearms.

While you're on supervised release, you'll participate in a program of testing and treatment for substance abuse, and you'll be subject to the standard search condition.

You don't have the ability to pay a fine, so the fine is waived. There's a hundred-dollar special assessment. You're remanded to the custody of the United States marshal to serve this sentence.

You have a right to appeal the sentence that I've imposed. If you decide to appeal, you need to file a written notice of appeal with the clerk of our court within ten days of the date the judgment entry is signed and filed by me. If you're unable to pay for a lawyer or pay the costs of an appeal, those costs will be paid on your behalf.

We need to talk about the revocation of supervised release, but before we get to that, I want to talk to you about [26] this Rule 35(b) motion. You're obviously familiar with it because you and I have been through that before, and there's been some indication by Mr. Fletcher that your assistance may be useful to the government on some of these cases.

And as you know, it's totally up to the U.S. Attorney's Office as to whether they file a Rule 35(b) motion. Mr. Stoler doesn't have the authority to file it on your behalf. I don't have the power, authority to initiate it on your behalf. Only the U.S. Attorney's Office does. But if they do, then I'd have another opportunity to review any additional substantial assistance and then reduce your sentence accordingly.

The number-one thing I look for is to see if you're truthful. As long as you're truthful, I would use these same factors that I discussed. And while there are no guarantees or promises, I certainly know of no reason why I wouldn't give you a further reduction if I had the opportunity to do so based on the, you know, nature and extent of your substantial assistance.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: So, you know, there's always hope for that because I realize that the sentence that I've

imposed, even though it's a 35 percent reduction, is a very, very lengthy sentence indeed.

Let's take up the supervised release. I don't know – I'm not even sure what the time frames are, so you probably have some procedural ground you could raise if you want to and we [27] could come back and do it another time. But I suspect we might as well resolve it now, but I don't want to put any pressure on you to do that.

MR. STOLER: Your Honor, I had a moment to discuss with Mr. Putensen as far as the –

THE COURT: Absolutely.

MR. STOLER: No, I have had.

THE COURT: Oh, you have had. Okay. Great.

MR. STOLER: It's his intention to waive any notice requirements, and he intends to admit to the petition for offender under supervision.

THE COURT: Okay. Then I'm going to find that you're in violation of the two mandatory conditions contained in the petition.

Mr. Fletcher, do you have a recommendation?

MR. FLETCHER: We'd ask that you follow probation's recommendation in this case of that range, and it's up to the Court whether you run it concurrent or consecutive.

THE COURT: Do you have a view on that?

MR. FLETCHER: I don't know what probation recommended to you, but whatever they recommended, whatever you want, that's your discretion, Your Honor.

THE COURT: Okay. Mr. Stoler?

MR. STOLER: Your Honor, I would ask you to consider based upon the sentence you've imposed to run it concurrent to [28] the sentence that has been just imposed on the case, the reason being is that there is the issue that he was in state custody from back in July of '07 until he came into federal custody 5 months – 5 months there that isn't going to be accounted for, I'm sure he's not going to get credit for.

So from that standpoint there is a little bit of time he should be entitled to. And the nature of what his violation was I think is evident from what he's pled to in the indictment that was filed against him, and I think that it runs as part of that, and a sentence of 46 months that's concurrent to the sentence just imposed I think would be an appropriate sentence for Mr. Putensen.

THE COURT: Mr. Moore, do you want to put on the record what your recommendation to me was?

MR. MOORE: In chambers we had discussed time served sentence concurrent to this sentence. I believe if we – if you followed my recommendation of a time served sentence then we would end up having a variance issue due to the guideline range, but I believe the 46 months concurrent would essentially have the same effect as a time served sentence concurrent.

THE COURT: Well, I agree with the last part of your statement. I don't really agree with the former. It wouldn't really be a variance. It's not a guideline. It's a policy statement, and I'm not bound by it. And, therefore, it doesn't arise to the effect of an advisory guideline. And, therefore, [29] I'm free to do a variance.

But I think you have an excellent suggestion. The 46 months concurrent accomplishes the same thing as

time served, and then we avoid whatever it would be. You called it a variance. I think it would be a disagreement with the policy statement. So I'm going to go ahead and impose a 46-month sentence, run it concurrently with the sentence that I've just given you. And I don't think I have to make any other findings.

THE DEFENDANT: Thank you, Your Honor, for that.

THE COURT: Pardon me?

THE DEFENDANT: Thank you.

THE COURT: Yep. You're welcome. I think – can I just end his supervised release on what I just revoked it on?

MR. MOORE: (Nodded head.)

THE COURT: Yeah, there will be no additional term of supervised release because you have the ten years of supervised release on the underlying charge that I sentenced you on.

Mr. Putensen, I just wanted to say this to you, that, you know, my heart really goes out to you. When I – it just made me sick when I read the presentence report. And I know how remorseful you are. And I think you're very sincere. And you are – like so many people I see, you're a meth addict. You didn't have – I guess you had control the first time you used it, but once you became an addict, it's kind of almost out of your hands for most people because it's such a powerfully [30] addicting drug. And I just regret the fact that I had to impose this sentence.

But, you know, it's a nation of laws, and I have to follow the laws whether I agree with them or not, and I try and do that to the best of my ability.

But I just wanted you to know personally I have a lot of empathy for you and the situation you're in. You've always been very, very candid with me and very honest, and I appreciate that. And I'm just – I regret very much having to give you the sentence that I imposed.

So good luck to you.

And I'd ask our U.S. marshals to see if they could accommodate a family visit.

THE DEFENDANT: Thank you.

THE COURT: Okay. Good luck, Mr. Putensen.

And also – I wanted to give the U.S. Attorney's Office an opportunity to object to the extent of my substantial assistance departure if you'd like to do so.

MR. FLETCHER: Thank you for the opportunity, but I have nothing to say, Your Honor. Thank you.

THE COURT: Okay. Thank you. We'll be in recess.

(The foregoing sentencing was concluded at 2:54 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	No. CR14-4017
Plaintiff,	TRANSCRIPT OF SENTENCING
vs.	
JOSE MANUEL GARDEA,	
Defendant.	

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, July 17, 2014, commencing at 10:28 a.m.

APPEARANCES

For the Plaintiff:	JAMIE D. BOWERS, ESQ. Assistant United States Attorney Ho-Chunk Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	MICHAEL SMART, ESQ. Assistant Federal Defender Suite 400 700 Pierce Street Sioux City, IA 51101
Also present:	Jill Freese, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101 (712) 233-3846

[2]

THE COURT: Thank you. Please be seated. Good morning.

THE CLERK: This is Case Number 14CR4017-1, United States of America versus Jose Manuel Gardea. Counsel, please state your appearance.

MR. BOWERS: Jamie Bowers here for the government. Good morning, Your Honor.

THE COURT: Good morning.

MR. SMART: Michael Smart appearing for the defense. Good morning.

THE COURT: Good morning, Mr. Smart. Have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. SMART: I have.

THE COURT: And do you agree the total offense level is 23, criminal history category 4, advisory guideline range of 70 to 87 months; however, there's a mandatory minimum 120-month sentence, and the statutory maximum is life?

MR. SMART: I would agree with that.

THE COURT: And does the government agree with those calculations?

MR. BOWERS: Yes, Your Honor.

THE COURT: And is the United States making a substantial assistance motion?

MR. BOWERS: We are, Your Honor. We're making both [3] motions and recommending 20 percent off the 120-month minimum.

THE COURT: Okay. And would you like to go through the substantial assistance factors?

MR. BOWERS: Yes, Your Honor. Looking around the courtroom, it looks like everybody here is friendly to the defendant, and so I will be a little freer to talk about what he did.

The defendant has testified in the grand jury for me on a case yet to be indicted. I expect it will be soon. We're waiting on a lab report, and that's pretty much what's left. But I brought him in early because I wasn't sure once the case got charged whether there would be any other work for him to do. It's a pretty strong case, but he helped.

The big deal is Mr. Gardea is a – or was at least a gang member, and he's got gang markings tattooed on his body, and they're big ones, and they are going to be hard to get off, and he – his life will be lived with that and has been. He testified against a person that is gang affiliated, and that isn't a big deal right now, but once it's disclosed that he did that, that will be a big deal for him, I expect.

In the age of social media, news travels fast, and Mr. Smart and I were talking about this before – just before the hearing here. We have reports that even in the prison system presentence investigation reports, pretrial memos from both sides find their way into the hands of folks, and I cant [4] stop it, but it's a concern I have.

That being said, Mr. Gardea gave a really thorough debriefing. I talked to him about four hours I think in a jail one day with Mr. Smart. And he's been candid I think and talked about some folks that if I

were he I probably wouldn't want knowing that I talked.

And so we took what he said, and I was able only to make one case out of it. Frankly, the case is strong without him, but it's stronger with him. And I wanted to give him an opportunity to come in and talk about it, and he did.

I think he's a smart man. I don't know if he's book smart, but he appears to be a thoughtful person, and, frankly, I was surprised at the candidness that I got in the interview. So with that, I think it merits a 20 percent reduction.

THE COURT: Is there much likelihood of a Rule 35(b) motion?

MR. BOWERS: He talked about some other people who are active in the drug trade here. Most of what he told us was well known to us through other witnesses. It's a possibility. I would not – I would not be opposed to bringing him back if it was one of my cases. I just don't see it in the offing here.

THE COURT: Well, let's take, for example, the one person that you'll probably be able to indict.

MR. BOWERS: Yeah.

THE COURT: Let's say, for example, that person goes [5] to trial.

MR. BOWERS: If she goes to trial, I'm going to bring him back.

THE COURT: Yeah. And then there probably would be a Rule 35(b) motion.

MR. BOWERS: Exactly right.

THE COURT: Okay. But person pleads, probably not.

MR. BOWERS: It's a strong case.

THE COURT: Yeah.

MR. BOWERS: Yeah.

THE COURT: You already have a strong case without him.

MR. BOWERS: I do.

THE COURT: Stronger with him I think was your phrase. Strong without him; stronger with him.

MR. BOWERS: That's right.

THE COURT: Yeah. Mr. Smart?

MR. SMART: Thank you, Your Honor. I appreciate Mr. Bowers being very thorough. He and I have talked about this case quite a bit. I would just add with regards to some of the dangerousness that our clients who have had either gang affiliations or former gang affiliations or having – this is just anecdotal. I don't have statistics on it. But our office has noted an increase in our clients calling us back to see if there isn't something we can do for them because it seems that [6] in the advent of social media with people who are getting on to the – they're getting on to the court docket system, and they're seeing what our clients have done, and it has become more dangerous for them. And that is a problem.

I would – I don't really have a great deal to add because I think Mr. Bowers was very thorough in addressing the assistance-related factors to the Court.

This Court has cited before that the average assistance-related departure is about 47 percent

across the nation. I would say that my client was certainly truthful and very complete. I sat in on those proffers, and he was very detailed.

You know, based on that, I would ask the Court to go a little bit closer to the average. I'm not suggesting maybe 47 percent, but at least 40 percent I think would be reasonable in this case. He did testify in front of grand jury, although I understand he was a – what would be termed as a minor witness. However, when he goes away to prison, he is certainly going to be facing – almost certainly going to be facing some real risk because of his gang affiliations. The person he testified against also has very strong gang affiliations. Once discovery becomes available in that case, unfortunately my client's going to be discovered, and word's going to get out to other gang members what he did, and he's going to have to live with that.

So I can't say that the threat has been made to him [7] now, but I would anticipate that he's going to have to live with that in prison, and it's a difficult thing to do.

So I would respectfully request the Court to consider 40 percent.

THE COURT: Well, Mr. Smart, he's done substantially less than the average cooperator. I mean, it hasn't even been placed in anyone's discovery file. No one's even been indicted yet. So to say it's closer to the national average, I don't see that. He testified in front of the grand jury, and somebody may be indicted, and they could have been indicted without it. So I don't consider that to be an average cooperator. An average cooperator would be probably somebody who's either testifying in the grand jury or an agent testified about

what they knew. It was placed in the person's discovery file, and there's a link between that and the person pleading guilty. Maybe – you know, maybe an average is even a little more than that.

But to say that this approximated an average cooperator, this approximates about the minimum somebody could do. What could somebody do that would be less than this and still get a substantial assistance motion? I guess they could debrief, but, you know, the difference between debriefing and testifying in front of a grand jury where it's a secret proceeding, you're not being cross-examined, you know, I don't think that's a huge difference.

MR. SMART: Except that the government has either — [8] and I'll have to ask Mr. Bowers if he's already indicted that individual or —

THE COURT: He said he hadn't.

MR. SMART: But I believe Mr. Bowers intends to indict the individual, so his discovery will be placed in that individual's file. And as far as the average cooperator, it's pretty typical in our discovery files that we review a single case might have three or four cooperators. And some of those cooperators will have testified in front of a grand jury. Some of them might not have. You know, I assume when I see average, I assume the person that is above average is somebody that's made a controlled buy or somebody that's gone to court to testify.

But the people that have made controlled buys and the people that have gone to court to testify at least in my experience – I don't have statistics to give the Court. I can only testify or tell you from my experience. People that have actually made those controlled buys

or testified, I would say they're in the minority that are —

THE COURT: I would agree with that.

MR. SMART: So if I'm going to go with average, closer to the average has to be the people that are giving information, maybe testified in front of grand jury. But typically where you have three or four cooperators, their testimony becomes cumulative. It's certainly better for the government if they [9] have three or four or five cooperators testify at trial.

THE COURT: One of the reasons why national averages aren't all that helpful is so many – you know this because you know how Nebraska works. And there they do what? Rule 35(b) motions. And so I think that's all thrown in in this national average. I don't think they separate out substantial assistance from 5K motions to Rule 35(b) motions. So, you know, some districts do only Rule 35(b) motions. So that kind of skews it too so it's –

MR. SMART: And that's true, Judge. And I've actually – I've searched for better studies. There's a 1998 study, but I think that's kind of dated. So I haven't found one that breaks it down further for us to get a better idea. So that leaves me to just kind of go with my own experience or the experience of my office. And, you know, at least based on my experience what I see in discovery files, I wouldn't place him – I think he's closer to the average. I don't think he's quite to that median.

THE COURT: Well, how about going back to the original question I posed? And that is what would be the least that somebody could do and still get a substantial assistance motion?

MR. SMART: I think the least somebody could do and still get a substantial, just talk about a couple of people, never go to grand jury, maybe talk about a couple of people, give the government leads where they eventually develop cases [10] and – but the witness isn't valuable enough to pull into a trial.

THE COURT: Well, this is pretty close to that, isn't it?

MR. SMART: Well, he did testify in front of grand jury.

THE COURT: And why is that that significant rather than just providing a debriefing?

MR. SMART: If he testified in front of grand jury, even though they said they already had a strong case against the person, if he testified in front of grand jury, I have to assume that that person's a good-enough witness to use at trial. And so he's ready, willing, and able to go to trial. Whether he gets that opportunity or not, I don't know. But as the Court knows, at trial you want more than one cooperator to come in because their credibility is always suspect. So, you know, based on that, I would place him a little bit closer to the average.

THE COURT: Anything else?

MR. SMART: No.

THE COURT: Okay. Thank you, Mr. Smart.

Mr. Bowers, anything else you want to add?

MR. BOWERS: If you don't mind, Your Honor, I'd kind of like to add to this. Actually I'm probably the guy who can tell you about what's the least and what's the most and all [11] that. As you know, you've been an active spectator on this issue for years and years.

And it's changed a bit depending on who's in charge and what the national marching orders are.

But the least in my mind is – as you've seen, I've recommended no motion on times – in times when people have debriefed and given us a proffer interview. In those situations it's usually somebody who regurgitates what they think we already know or, frankly, tells us the truth but we already know it and there's nothing – there are no fish in the boat as we say, there's nothing new to be gained.

The very least where we make a motion currently is where someone debriefs but tells us information that we don't know and then we can corroborate after the fact. So it's useful information that we can add to the pile and add to our intel.

Currently we are as a rule or as a trend anyway making motions for people, minimal, but we are.

It is true I think in this case that we are one notch above that, that Mr. Gardea based on my assessment of this was asked to come in and give what I believe is truthful testimony in front of the grand jury. Is he the main witness in this case? No. Is he a corroborative witness that's useful? He must be because I asked him to come there, and so it's self-evident. But he did something beyond the lowest rung if that's the question.

The big question is what's it worth. I think our 20 [12] percent recommendation is reasonable, and stacking up against the other folks, it makes sense. But he probably wasn't the minimal participant. He wasn't the bottom of the rung on folks that get motions. He did something extra.

The big deal, however, is I would treat him like someone who testified against a family member. Being a gang member, an OG as we call him, an original gangster in this local set, he is thought of as – or at least was thought of as family. And that can often be a big deal when someone testifies against another gang member. I think he's removed himself quite a bit from that milieu, but there's still that. And when he goes to prison, he will have to line up north versus south. That's just how it works. And so there is that added thing.

THE COURT: Is the gang just a local gang?

MR. BOWERS: No, no. It's —

THE COURT: Florencia; right?

MR. BOWERS: Florencia 13. It's – Mr. Gardea can tell you. I don't expect him to, and I don't actually want him to here.

THE COURT: Right.

MR. BOWERS: But there are different sets. The one we have here is much disorganized. But nationwide historically it's a pretty pervasive and powerful gang.

THE COURT: Doesn't it have ties to Guatemala?

MR. BOWERS: I don't know that, but I know it [13] originates out of California and —

THE COURT: Yeah. Mr. Smart, anything else you'd like to add?

MR. SMART: No, nothing further.

THE COURT: Do you have any more insight on the gang affiliation because that seems to be maybe one of your stronger points?

MR. SMART: You know, with regards to the gang affiliation, I can just tell the Court the experience of our office, and I personally have had this experience with former clients calling me back asking me if I can somehow alter their PSIRs and send it to them because otherwise they're going to have to spend all of their time in the hole.

I just recently had a client in the Southern District who was sent to Florence, Colorado. The first day he walked on the yard he was viciously attacked by some other inmates who had people on the outside find out what happened, and so they attacked him, and then he immediately put himself in a hole. His family contacted me and told me he's being sent to a different facility now.

So it is a real problem but particularly where you have gang affiliations because they've got a network. And so I am concerned about that with this client.

Just for the —

THE COURT: I wonder if there's an app for that, [14] altering your PSR.

MR. BOWERS: There should be.

THE COURT: I'm sure there probably is.

MR. SMART: There probably is.

THE COURT: I think there are actually people who generate new PSRs for individuals.

MR. SMART: Yeah, my guess is they do licenses and all kinds of IDs so somebody can master that.

THE COURT: Yeah.

MR. SMART: You know, the Court asked about Guatemala, and I am – I've studied Guatemala a little

bit because I have a lot of clients from there. And unfortunately Florencia 13 is in Honduras and Guatemala. There's a Los Angeles connection.

THE COURT: Yes.

MR. SMART: But originally what had happened was is they had people indicted – or inducted in the gang in Los Angeles who were later deported, went down to those countries and then started up local chapters.

THE COURT: Yes, right. I've read about that. I think I've even seen a documentary about it, yeah.

MR. SMART: Yeah. And unfortunately I've had clients who have told me about that. So that's not anything to do with this case, but I just thought I would share that with the Court.

THE COURT: Okay. Thank you.

Mr. Gardea, you have the right to say anything to me [15] you want to. As you know, you have the right to remain silent.

And you don't have to say anything. And if you decide not to say anything, I will not hold it against you in any way. But if you'd like to say something, I'd be happy to hear what you have to say. Is there anything you would like to say?

MR. SMART: May I confer with him?

THE COURT: Sure.

THE DEFENDANT: No thank you, Your Honor.

THE COURT: Okay. Thank you.

Anything else either lawyer would like to add?

MR. BOWERS: No, Your Honor.

MR. SMART: No, Your Honor.

THE COURT: Okay. In this case I find the total offense level is 23, criminal history category 4. The advisory guideline range of 70 to 87 months is trumped by the mandatory minimum. So the mandatory minimum is 120 months. The statutory maximum is life.

I'm going to start at the mandatory minimum of 120 months. I'm granting the government's substantial assistance motion. Looking at the substantial assistance factors, I find that the defendant was timely.

In terms of the nature and extent of the defendant's assistance, it was certainly substantial. Mr. Bowers felt it important enough to take the defendant to the grand jury. Both lawyers indicate to me that the defendant was truthful, [16] complete, and reliable.

I have to evaluate the significance and usefulness of the defendant's assistance taking into consideration the government's evaluation. I agree with Mr. Bowers in terms of the significance of it. They had a strong case – they have a strong case against an individual who apparently will be indicted, but they have a stronger case with this information. So it's significant.

The factor that I'm going to focus on is danger or risk of injury to the defendant or his family resulting from his assistance. I think when a gang – former gang member provides information against a current or former gang member there's an increased likelihood of potential risk and injury. And I can pretty much take judicial notice of gang activity in Bureau of Prisons. Everybody knows it's there, particularly the – in the

higher-security facilities. And because of his prior record and criminal history, I doubt if the defendant would go to a prison camp. So he's more likely to encounter potential problems with gang affiliation.

So taking all that into consideration including the data on national averages which I give some weight to but not a whole lot of weight, I'm going to reduce Mr. Gardea's sentence by 30 percent from 120 months down to 84 months.

There's a possibility that you could be back in front of me on a Rule 35(b) motion, particularly if the person goes to [17] trial who's indicted or perhaps disputes the quantity and you're involved in either a sentencing hearing or trial. Of course, you have no control over whether that's going to happen. But if that happens, then there's a likelihood that I could further reduce your sentence. But who knows if that's going to happen?

So it's my judgment that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for 84 months.

Is there a facility you'd like me to recommend?

MR. SMART: Your Honor —

THE COURT: Yeah, it's not like a classroom where I call on people. Doesn't work that way. I appreciate it.

MR. SMART: Your Honor, as close to Iowa as consistent with his security classification.

THE COURT: Yeah, I'll make that recommendation, as close to Iowa consistent with the defendant's security classification.

I'm also going to recommend the 500-hour residential drug treatment program where you can earn up to a year off your sentence, although the average inmate earned about eight months off their sentence.

Upon release from imprisonment, you'll be placed on supervised release for eight years. While you're on supervision, you'll have the standard conditions set out in the judgment order. Additionally you can't violate any state, [18] local, or federal law. You can't possess or use any illegal drugs.

And while on supervised release, you'll have the following special conditions. You'll participate and successfully complete any testing and treatment for substance abuse. You're prohibited from using alcohol, going to bars, taverns, and other establishments whose primary source of income is derived from the sale of alcohol. You'll participate in any mental health evaluation and treatment and take all medications prescribed by a duly licensed physician.

You'll seek regular employment and participate in any employment workshops and report to the U.S. Probation Office to provide verification of daily job search. If you're unable to obtain full-time employment, you may be required by the United States Probation Office to do 20 hours per week of community service, up to 20 hours per week.

You'll be subject to the standard search condition which means United States probation officers can search your person, residence, place of employment, cellphone, computers, tablets, electronic storage devices, et cetera.

You don't have the ability to pay a fine, so the fine is waived. There's a hundred-dollar special assessment which can be paid pursuant to the inmate financial responsibility program. You're remanded to the custody of the United States marshal. [19]

I want to give you a heads-up. Should you be convicted in state court or federal court on another drug offense, you could potentially get a mandatory life sentence.

There's an appeal waiver in this case which means you've given up your right to appeal. So unless the sentence that I imposed was illegal, unconstitutional, or in violation of your plea agreement, you have no right to appeal. In those very limited situations, if you decided to appeal, you would need to file a written notice of appeal no later than 14 days from the date your judgment is filed. If you can't afford to pay for a lawyer, pay for the costs of an appeal, those costs will be paid on your behalf.

I'd ask the U.S. marshals to accommodate a family visitation.

And, Mr. Smart, anything further?

MR. SMART: No, Your Honor.

THE COURT: Okay. Thank you for your representation.

And, Mr. Bowers, anything further?

MR. BOWERS: No, Your Honor.

THE COURT: Okay. Thank you for your representation.

Good luck to you, and we'll be in recess.

UNIDENTIFIED FEMALE: Your Honor?

THE COURT: Yes.

UNIDENTIFIED FEMALE: Would it be okay if his mom gave him a hug? [20]

THE COURT: No. I'm sorry. That's against U.S. marshal policy.

UNIDENTIFIED FEMALE: Okay.

THE COURT: I appreciate you asking.

(The foregoing sentencing was concluded at 10:54 a.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	No. CR14-4016
Plaintiff,	TRANSCRIPT OF SENTENCING
vs.	
ESEQUIEL GUTIERREZ,	
Defendant.	

/

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, July 31, 2014, commencing at 9 a.m.

APPEARANCES

For the Plaintiff:	JAMIE D. BOWERS, ESQ. Assistant United States Attorney Ho-Chunk Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	PAMELA A. WINGERT, ESQ. Assistant Federal Defender 1212 18th Street Spirit Lake, IA 51360
Also present:	Stacy Sturdevant, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101

(712) 233-3846

[2]

THE COURT: Thank you. Good morning. Please be seated.

THE CLERK: This is Case Number 14CR4016-1, United States of America versus Esequiel Gutierrez. Counsel, please state your appearance.

MR. BOWERS: Jamie Bowers here for the government. Good morning, Your Honor.

THE COURT: Good morning.

MS. WINGERT: Pamela Wingert for the defendant.

THE COURT: Good morning, Miss Wingert. Miss Wingert, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MS. WINGERT: I have, Your Honor.

THE COURT: And do you agree that the total offense level is 31, criminal history category 6, advisory United States Sentencing Guideline range of 188 to 235 months; however, there's a mandatory minimum of 20 years, so the advisory guideline range becomes the mandatory minimum of 240, and the statutory maximum is life?

MS. WINGERT: I agree, Your Honor.

THE COURT: And does the government agree with those calculations?

MR. BOWERS: Yes, Your Honor, we do.

THE COURT: And does the government have any objections to Defendant's Exhibits A and B? [3]

MR. BOWERS: Do not, Your Honor.

THE COURT: Okay. They're received.

* * * *

(Defendant Exhibits A and B were admitted.)

* * * *

THE COURT: I wanted to give the parties notice that I'm considering a upward variance based on the information contained in the 1B1.8 debriefing including the quantity of drugs and the nature of the home invasions. So just wanted to give you notice of that. We can take that up. I haven't made up my mind yet, but I'm thinking that it might be appropriate to do an upward variance for those reasons.

And is the government going to be moving to seal a portion of the hearing?

MR. BOWERS: We are, Your Honor, for very good reasons. We would like to seal the portion where we talk about the motions.

THE COURT: Okay. And does the defense have any objection to that?

MS. WINGERT: No, Your Honor.

THE COURT: Okay. What I'm going to do is I'm going to – we'll take that up next. And I'm going to order the courtroom and the transcript sealed. And then when we're done with this matter under seal, then everybody else will be able to come back into the courtroom when I announce the sentence. But [4] right now everybody that's not associated with federal and state law enforcement is required to leave the courtroom. That would be everybody in the back part of the courtroom.

(Sealed proceedings are contained in a separate, sealed volume.)

THE COURT: Miss Wingert, were you present during the debriefings?

MS. WINGERT: Yes, Your Honor.

THE COURT: Okay. And do you dispute Mr. Bowers' characterizations about the number of home invasions?

MS. WINGERT: You know, I didn't have a particular number. I —

THE COURT: Well, neither did Mr. Bowers.

MS. WINGERT: Right.

THE COURT: But he just said there were many, many, many is what I took out of it.

MS. WINGERT: I think that would be an exaggeration. Many might —

THE COURT: I was paraphrasing. There were many?

MS. WINGERT: I think that might be a more appropriate characterization.

THE COURT: Well, how many in your judgment? What's your best judgment about the —

MS. WINGERT: My best guess would be maybe less than ten which is still a lot of home invasions. [5]

THE COURT: Yes. Okay.

Mr. Bowers, can you quantify it at all?

MR. BOWERS: I can't. I think that's probably fair.

THE COURT: Okay. Now, why shouldn't I consider that in addition to the drug quantity mentioned in 1B1.8? I mean, I'm allowed to consider

it. It would seem to me that this case calls out for a substantial upward variance based on the dangerousness of the defendant, the threat to the community, and his whole course of conduct conducting home invasions and ripping off other drug dealers. So – but, you know, the government didn't move for that. So I'm interested in what the government's view is.

MR. BOWERS: You certainly can consider it in the —

THE COURT: Should I?

MR. BOWERS: I think you should consider it. It's a – it's part of the presentence investigation report. Our proffer letter, contract, says that you can consider it. It's all fair game for sentencing. It's not fair game for us charging based on – it's basically a use immunity section of the proffer letter contract which our circuit and others have said that's what it is; it's a contract, and it means what it says.

It's a risk that sometimes defendants take. They come in, and they tell us the whole story, and the whole story helps us. But sometimes it hurts them. I didn't move for an upward [6] variance. Frankly, I thought 240 months was a lot of time. It's above the guideline range which is – sometimes happens. But in the spirit of where this thing was going, I viewed it that way.

THE COURT: Well, it's a lot of time. Boy, do I understand that. But it's not a lot of time for what he did. I mean, there are plenty of defendants who less quantity, no home invasions, no thuggery going on that get a 240-month sentence. So for what he did, it strikes me as actually low. But I have a policy kind of

question. If I do an upward variance on my own, does that undermine the government's ability to have people cooperate?

MR. BOWERS: I don't want to put you in that trick bag, Judge. I don't want to put you in that box. Maybe is my answer. I try to live – I try to walk as a prosecutor this way. I like to say, hey, look, we need your cooperation, we'd like to know something about X. If you – if you tell me the truth, if you're complete and you're accurate and you're all those things that qualify under the 5K, then we come in, and we make a motion. And I like to be able to have folks say he did what he said he was going to do.

This is separate and apart from that somewhat. But it's still in the realm. And I can see a defendant thinking, boy, that was a stupid mistake on my part. I should have shut up and gone home and let the chips fall. [7]

So the answer to your question probably is closer to yes, but maybe is the best I can do because it's situational. Every person's different here.

THE COURT: Let me ask – let me ask it a different way. If I were to vary upward but then depart downward more than the government recommended and wind up at or near the same place the government recommends, I don't believe that would undermine the government's position. Do you see what I'm saying?

MR. BOWERS: I do. And again, I must tell you this, that in our conversations with defendants, we – I don't want to say we. I want to say me because this is the only thing I know. It's always clear that it's up to the sentencing court always.

Now, I think that's right. I mean, I think technically how we do things based on how our law here has evolved on this issue, I think that's exactly correct. You could do that, and it would certainly be within – within your prerogative, and I think it would make sense to a defendant if that happened.

THE COURT: And it really wouldn't undermine your goal either because the defendant would wind up pretty much where the government recommended.

MR. BOWERS: I want a defendant to go to prison thinking I'm here because I did something bad and I could have been worse because I did something good to help the government, [8] not sitting in a cage thinking I got screwed because of the system and because of the guidelines and because the government reneged on their word. That's what I don't want to have happen.

THE COURT: Right. And I don't want that to happen either.

MR. BOWERS: Yeah.

THE COURT: We actually share that view.

MR. BOWERS: Sure.

THE COURT: And I know Miss Wingert doesn't want that to happen either.

MR. BOWERS: Right.

THE COURT: Anything else you'd like to add?

MR. BOWERS: No, Your Honor.

THE COURT: Miss Wingert, anything else you'd like to add?

MS. WINGERT: You know, Your Honor, I guess as far as the mandatory minimum, you know, it sets the guideline range, but otherwise we would have a

guideline range below that mandatory minimum. I'd like to see the Court come off that mandatory minimum and not do that variance upward.

THE COURT: Well, except that the guideline range doesn't reflect everything in paragraph 21 and 22. Matter of fact, it doesn't take any of that into consideration whatsoever.

MS. WINGERT: Right.

THE COURT: So it's another flaw in the guidelines. [9] Because they're general guidelines, they can't reflect the information in every specific case, and in here they don't. I mean, if he had done no home invasions and no strong-arm robberies, we'd be at the same range we are now.

MS. WINGERT: And we would be looking at the mandatory minimum of 240 months, and what he did there was information he gave them to try to help the government. I would hate to see us put in a position where because he gave more information then we would be looking at a sentence that would be higher than if he had kept his mouth shut. And that would be potentially an outcome here if we do an upward variance.

THE COURT: Well, not if I go below the 240 with the – with the motion going downward.

MS. WINGERT: Well, he's not getting the full benefit, though, then of his cooperation from where we start.

THE COURT: Well, yes, he is, but he's – but we start at a different point based on his actual conduct.

MS. WINGERT: And conduct, though, then that the government and the Court wouldn't know about unless he had attempted to cooperate.

THE COURT: But – but – okay. But let's say he didn't debrief at all. He'd be at 240; right?

MS. WINGERT: Right.

THE COURT: So as long as he gets sentenced below 240, he gets the benefit of cooperating. But he doesn't get as much [10] benefit as if he wasn't a serial armed strong-arm robber. And what's wrong with that? What's wrong with somebody who's a serial strong-arm robber getting more time than somebody who isn't? I mean, to me it's like how could you possibly look at it any other way?

MS. WINGERT: You know, one thing I guess that's different about that, Judge, when we start with the mandatory minimum at 240, I don't have the opportunity to try to present to the Court mitigating factors in a motion for a downward variance because the only reason that we would go down below what the guideline and the mandatories say would be because of his substantial assistance. So I couldn't try to help the Court with reasons why we might have wanted to lower that guideline range and we're left then with what the substantial assistance motion would come down off the 240.

THE COURT: Well, there is some truth to that but only to the extent that you didn't anticipate that a judge would want to go upward for somebody who is a serial strong-armed robber.

MS. WINGERT: Well, I guess –

THE COURT: So tell me what you think the mitigation – you want me to continue it to allow you to put on mitigation? I mean, to be honest with you, unless he was a Pope or something that he hasn't disclosed to the rest of us, I can't imagine any mitigation would overcome my view of him that he self-disclosed that he was a strong-arm r – repeat, [11] multiple-armed invasion person. It would take extraordinary mitigation to overcome that. You know, I've seen mitigation in thousands of cases. I've never seen mitigation that would overcome my view of a strong-arm home invader because we see so few of them.

MS. WINGERT: We do. But, Judge, I think if you looked at the presentence report, there was a period in his life when there was a break in how his life had been going. That early adolescent drug abuse started when he's about 16 years old, I think impulse control and those kind of things that developed after that —

THE COURT: I understand that. I wrote a lengthy opinion about it in United States versus Hendrickson. But I wasn't dealing with a strong-arm serial home invader. And no amount of sociology or psychology is going to convince me that a childhood caused somebody to be an armed serial home invader, and I wouldn't find it – I just can't imagine a case where I would find that mitigating. It's different than being an addict. You know, I mean, he was addicted to strong-arm home invasions of drug dealers to make money, but it wasn't a psychological addiction.

MS. WINGERT: But he did have a methamphetamine addiction that started at a young age.

THE COURT: Yeah, I understand that, but that doesn't excuse violence in my view. [12]

MS. WINGERT: I'm not saying it excuses it. I'm just asking for mitigation on those purposes.

THE COURT: You really – if I gave you a continuance, do you have any confidence that you could come up with any mitigation other than what you've argued now?

MS. WINGERT: I guess as far as what I would have, I think it appears in both the letters that we've submitted and also in the presentence report.

THE COURT: Right. There isn't anything else lurking there that —

MS. WINGERT: No.

THE COURT: – you know –

MS. WINGERT: No. I would certainly have argued about the methamphetamine guidelines. The Court has been willing to consider that in the past on a variance position also. So the addiction, methamphetamine guidelines —

THE COURT: Yeah, but that doesn't really help you because we're at a mandatory minimum.

MS. WINGERT: Well, and that's why, you know, I didn't file a motion.

THE COURT: I understand your position. I just disagree with it. And, you know, I think 99 percent of judges looking at somebody who is a serial recidivist armed home invader would want to take that into

account at sentencing. I mean, I can't imagine not. Can you imagine if you were a judge [13] not wanting to take that into account?

MS. WINGERT: I think you would take it into account, Judge, and I think that's understandable. But I would ask that you consider these other factors as well.

THE COURT: Okay. That's very reasonable. And I will consider them because to be quite candid with you, I'd have no qualms about varying up to a life sentence. I wouldn't lose a – and I sweat over these sentencings. I think you know that. I wouldn't lose a second of sleep giving Mr. Gutierrez a life sentence. And, you know, if you ask members – it's not a popularity contest. But if you ask members of the public and they knew what I knew, virtually a hundred percent of people would say he's deserving of a life sentence. I don't believe my view is idiosyncratic. Who varies downward more than me in the country? Name a single judge who goes downward more often than I do. You can't. Can you?

MS. WINGERT: No.

THE COURT: Okay. So it's not that I'm out to impose harsh punishment on people. I'm not. I was the second judge in the country to have a substantial disagreement with the meth guidelines. Well, actually the first with meth guidelines and the first to reduce them by 33 1/3 percent. So, you know, nobody can say that I'm a Maximum Mark out there trying to impose the maximum possible punishment. It's just the opposite. But when I see somebody who is a threat to society and a violent [14] threat to society, I intend to punish them accordingly.

Now, the fact that it was 1B1.8, you know, militates against using it fully. I understand that. The fact that I don't want to undermine the government's ability to get cooperators – I mean, if I were to just go ahead and vary up to a life sentence, that wouldn't promote the government's ability to have people cooperate because here it's [sic] very cooperation that would have caused me to go up to a life sentence, and I understand that. And while I'd be comfortable giving a life sentence, I'm not going to.

And I think he should be rewarded for substa – for the motion the government made, and I intend to do that. And I actually intend to reward him with a higher percentage than what the government recommends.

So if I was out to just impose harsh punishment, I wouldn't do that, would I? Would I?

MS. WINGERT: No, Your Honor.

THE COURT: Yeah. Okay. So, Mr. Gutierrez, you have the right to say anything to me that you want to. You don't have to say anything. You have a right to remain silent. If you exercise your right to remain silent, I will not hold it against you in any way. But if you'd like to say something, I'd be pleased to hear what you have to say. Is there anything you'd like to say?

THE DEFENDANT: Your Honor, I just want to apologize [15] to society and to your courts and to my family for just – I just want to apologize to the courts, to society for everything I've done. I know I – like I say, I been bad to society. You know what I mean? I just been a ghost to myself, you know, and I just hope you have a little mercy on me and give me the – whatever I deserve.

THE COURT: Well, I don't think you want whatever you deserve.

THE DEFENDANT: No, I know I don't, sir.

THE COURT: You want something lower than that; right?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Okay. And I'm going to give you something lower than what you deserve.

THE DEFENDANT: Something my family would deserve.

THE COURT: Pardon me?

THE DEFENDANT: Something my family – something that won't hurt my family so much. That's who's paying the price right now, my daughter right now.

THE COURT: Sure.

THE DEFENDANT: You know, I got many kids and –

THE COURT: Got a lot of kids, but you weren't thinking about them when you're out doing strong-arm robberies.

THE DEFENDANT: No, I wasn't, sir. You know, all I ask is have mercy for my children and my family.

THE COURT: Thank you. That's a very fair request. [16]

THE DEFENDANT: You know what I mean? I know what I done, and I can't take it back, but I'm here to pay what I owe.

THE COURT: Anything else?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay.

THE DEFENDANT: I just apologize.

THE COURT: Thank you. You're very well spoken, Mr. Gutierrez. Thank you.

Anything else either lawyer would like to add?

MR. BOWERS: No, Your Honor.

MS. WINGERT: No, Your Honor.

THE COURT: Okay. In this case I find the total offense level is 31, criminal history category 6, mandatory minimum 240-month sentence, maximum sentence life, advisory guideline range of 188 to 235 months.

The advisory guideline range does not take into account the quantity of drugs the defendant admitted to in his 1B1.8 statement, and the guidelines do not take into account the dangerousness, recidivism, serial repeat strong-armed robberies and other robberies ripping off drug dealers of drugs and money.

And so I'm going to vary from the mandatory minimum of 240 months based on the reasons that I've discussed taking into consideration the mitigation that defense has argued because otherwise potentially I would go quite a bit higher. But I'm going to go up to 300 months based on the upward variance. [17]

But I'm granting the motions – the government's motion, and so I'm now going to depart downward based on the 5K1.1 factors. I find that the defendant was very timely. The nature and extent of the defendant's assistance here is quite substantial providing important information against one

individual who's already pled guilty and significant information against other individuals but they – that hasn't risen yet to the level of substantial assistance because the government hasn't been able to act on that information.

I believe Mr. Gutierrez was truthful, complete, and reliable. And I agree with the government's evaluation of the significance and usefulness of it. There really isn't – is there any evidence or any argument even to suggest injury or danger or risk of injury to the defendant or his family? I mean, he seemed to be in a milieu of very dangerous activity, so that probably in and of itself suggests there's more of a possibility of dangerousness than there would be in the typical case simply because the defendant was more dangerous than other defendants. I'm really not sure about the logic of rewarding him for being dangerous; therefore, the likelihood of greater danger to him. That seems to be a little bit odd, but what's the government's position on this prong?

MR. BOWERS: He's not a delicate flower. I don't think based on what we've heard here today that that's – he's been put at risk, but there is the stigma that even this hearing [18] alone might place on him, so there's that.

THE COURT: Miss Wingert, anything else you'd like to add on that?

MS. WINGERT: I don't have any specifics to offer to the Court just other than the general circumstances.

THE COURT: Right. I think the general circumstances indicate that that's a slight factor in

favor of Mr. Gutierrez. So I'm going to depart downward from 300 months down to 192 months.

And so my final judgment is you're hereby committed to the custody of the Bureau of Prisons to be imprisoned for 192 months.

Is there a facility you'd like me to recommend?

MS. WINGERT: Yes. We'd like Victorville, California, or Terminal Island would be closest to his mother.

THE COURT: Okay. I haven't been to Victorville, but I've been to Terminal Island. It's in Long Beach. It's a very well-run facility, kind of a medium-security facility. It actually has a nice view of the ocean and the Long Beach Harbor, very well-run facility. So I'll recommend either one of those facilities to the Bureau of Prisons.

I'm also going to recommend the 500-hour residential drug treatment program where you can earn up to a year off your sentence, although the average inmate earned about eight months off their sentence. [19]

Upon release from imprisonment, you'll be placed on supervised release for ten years. While you're on supervised release, you can't violate any state, local, or federal law. You'll have the – you can't possess or use any illegal drugs. You'll never be allowed to possess a firearm, ammunition, destructive device, or dangerous weapon. And you'll have other standard conditions set out in your judgment order.

You'll have some special conditions. You'll participate and successfully complete a program of testing and treatment for substance abuse while you're

on supervised release. Also you're not allowed to use alcohol or go to bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

You'll participate in any mental health evaluation and treatment and take all medications that are duly authorized. You need to make efforts to pay your past and current child support obligations. And you need to cooperate with state authorities to help effectuate the collection of payment of those obligations.

While you're on supervised release, you need to look for full-time employment and participate in any employment workshops, training, et cetera, recommended by your United States probation officer. Until you obtain full-time employment, your United States probation officer may require you to do up to 20 hours of community service per week. [20]

You'll be subject to a standard search condition which means United States probation officers can search your person, residence, automobiles, motor vehicles, personal property, cameras, cellphones, computers, iPads, flash drives, electronic storage devices.

You don't have the ability to pay a fine, so the fine is waived. There's a hundred-dollar special assessment due and owing. You're remanded to the custody of the United States marshal.

Just a heads-up. If you were to be sentenced in federal court on another drug offense, you'd likely be looking at a mandatory life sentence with no possibility of release, so that means you would die in one of the 118 United States prisons.

There's an appeal waiver in this case which means you've given up your right to appeal. So unless the sentence that I imposed was illegal, unconstitutional, or in violation of your plea agreement, you would have no right to appeal. In those very limited situations, if you decided to appeal, you would need to file a written notice of appeal with the clerk of our court no later than 14 days from the date your judgment is filed. If you can't afford to pay for a lawyer, pay for the costs of an appeal, those costs would be paid on your behalf.

I'd ask the U.S. marshals to accommodate a family visit. [21]

Miss Wingert, anything else on behalf of Mr. Gutierrez?

MS. WINGERT: No, Your Honor.

THE COURT: Thank you for your representation.

Mr. Bowers, anything else on behalf of the United States?

MR. BOWERS: No, Your Honor.

THE COURT: Okay. Thank you for your representation. We'll be in recess.

(The foregoing sentencing was concluded at 9:44 a.m.)

United States Code Title 18
Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 227: Sentences

18 U.S.C. § 3553. Imposition of a sentence

Effective: May 27, 2010

(a) Factors to be considered in imposing a sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing

Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses

and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.– The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months,

the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the

Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

United States Code Title 28
Judiciary and Judicial Procedure
Part III. Court Officers and Employees
Chapter 58: United States Sentencing Commission

28 U.S.C. § 994. Duties of the Commission

Effective: October 6, 2006

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the (A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category

of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the

guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the

defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the

Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's

guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by

what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

United States Sentencing Commission
Guidelines Manual
Chapter One, Part B.

USSG § 1B1.1 Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* § 1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

United States Sentencing Commission
Guidelines Manual
Chapter One, Part B.

USSG § 1B1.10
Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitation and Prohibition on Extent of Reduction.—

(A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the

amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the

danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of

sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not

limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine

whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the

amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the

amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in § 2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to § 2D1.1 (*see* § 2D1.1, comment. (n.8)). Part C deleted the cross reference in § 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1.

6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with

this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under

subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

8. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C.

§ 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *See Dillon v. United States*, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines' or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

United States Sentencing Commission
Guidelines Manual
Chapter Five, Part G.

USSG § 5G1.1
Sentencing on a Single Count of Conviction

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence —

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

United States Sentencing Commission
Guidelines Manual
Supplement to Appendix C

Amendments to the Guidelines Manual

780. Amendment

Section1B1.10 is amended in each of subsections (a)(1), (a)(2)(A), (a)(2)(B), and (b)(1) by striking "subsection (c)" each place such term appears and inserting "subsection (d)"; by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection (c):

> "(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).".

The Commentary to § 1B1.10 captioned "Application Notes" is amended in Notes 1(A), 2, and 4 by striking "subsection (c)" each place such term appears and inserting "subsection (d)"; by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following new Note 4:

"4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction

comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by

operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.".

The Commentary to § 1B1.10 captioned "Background" is amended by striking "subsection (c)" both places such term appears and inserting "subsection (d)".

Reason for Amendment: This amendment clarifies an application issue that has arisen with respect to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Circuits have conflicting interpretations of when, if at all, § 1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below the statutory minimum due to substantial assistance.

This issue arises in two situations. First, there are cases in which the defendant's original guideline range was above the mandatory minimum but the defendant

received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. In a sentence reduction proceeding pursuant to Amendment 750, the amended guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the "trumping" mechanism in § 5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. *See* § 5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eighth Circuit has taken the view that the bottom of the amended guideline range in such a case would be 240 months, i.e., the guideline sentence that results after application of the "trumping" mechanism in § 5G1.1. *See United States v. Golden*, 709 F.3d 1229, 1231-33 (8th Cir. 2013). In contrast, the Seventh Circuit has taken the view that the bottom of the amended guideline range in such a case would be 168 months, *i.e.*, the bottom of the amended range as determined by the Sentencing Table, without application of the "trumping" mechanism in § 5G1.1. *See United States v. Wren*, 706 F.3d 861, 863 (7th Cir. 2013). Each circuit found support for its view in an Eleventh Circuit decision, *United States v. Liberse*,

688 F.3d 1198 (11th Cir. 2012), which also discussed this issue.

Second, there are cases in which the defendant's original guideline range as determined by the Sentencing Table was, at least in part, below the mandatory minimum, and the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. In these cases, the "trumping" mechanism in § 5G1.1 operated at the original sentence to restrict the guideline range to be no less than the mandatory minimum. For example, consider a case in which the original Sentencing Table guideline range was 140 to 175 months but the mandatory minimum was 240 months, resulting (after operation of § 5G1.1) in a guideline sentence of 240 months. The defendant's original sentence was 96 months, representing a 60 percent reduction for substantial assistance below the statutory and guideline minimum. In a sentence reduction proceeding, the amended Sentencing Table guideline range is 110 to 137 months, resulting (after operation of § 5G1.1) in a guideline sentence of 240 months. Section 1B1.10(b)(2)(B) provides that such a defendant may receive a reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, i.e., the guideline sentence that results after application of the "trumping" mechanism in § 5G1.1. *See United States v. Glover*, 686 F.3d 1203, 1208 (11th Cir. 2012); *United States v. Joiner*, 727 F.3d 601 (6th

Cir. 2013); *United States v. Johnson*, 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered. In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, *i.e.*, the bottom of the Sentencing Table guideline range. *See United States v. Savani*, 733 F.3d 56, 66-7 (3d Cir. 2013); *In re Sealed Case*, 722 F.3d 361, 369-70 (D.C. Cir. 2013).

The amendment generally adopts the approach of the Third Circuit in Savani and the District of Columbia Circuit in *In re Sealed Case*. It amends § 1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of § 1B1.10 the amended guideline range shall be determined without regard to the operation of § 5G1.1 and § 5G1.2. The amendment also adds a new application note with examples.

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance. *See* USSG App. C. Amend 759 (Reason for Amendment). As the Commission noted in the reason for that amendment: "The guidelines and the relevant statutes have long recognized that defendants who provide substantial

assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing." *Id.*

Effective Date: The effective date of this amendment is November 1, 2014.

United States Sentencing Commission
Guidelines Manual
Supplement to Appendix C

Amendments to the Guidelines Manual

782. Amendment

Section 2D1.1(c) is amended by striking paragraph (17); by redesignating paragraphs (1) through (16) as paragraphs (2) through (17), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1)	• 90 KG or more of Heroin;	**Level 38**
	• 450 KG or more of Cocaine;	
	• 25.2 KG or more of Cocaine Base;	
	• 90 KG or more of PCP, or 9 KG or more of PCP (actual);	
	• 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of 'Ice';	
	• 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual);	
	• 900 G or more of LSD;	
	• 36 KG or more of Fentanyl;	
	• 9 KG or more of a Fentanyl Analogue;	
	• 90,000 KG or more of Marihuana;	

• 18,000 KG or more of Hashish;

• 1,800 KG or more of Hashish Oil;

• 90,000,000 units or more of Ketamine;

• 90,000,000 units or more of Schedule I or II Depressants;

• 5,625,000 units or more of Flunitrazepam.".

Section 2D.1(c)(2) (as so redesignated) is amended to read as follows:

"(2) • At least 30 KG but less than 90 KG of Heroin; **Level 36**

• At least 150 KG but less than 450 KG of Cocaine;

• At least 8.4 KG but less than 25.2 KG of Cocaine Base;

• At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);

• At least 15 KG but less than 45 KG of Methamphetamine, or

at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or

at least 1.5 KG but less than 4.5 KG of 'Ice';

• At least 15 KG but less than 45 KG of Amphetamine, or

at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);

• At least 300 G but less than 900 G of LSD;

• At least 12 KG but less than 36 KG of Fentanyl;

• At least 3 KG but less than 9 KG of a Fentanyl Analogue;

• At least 30,000 KG but less than 90,000 KG of Marihuana;

• At least 6,000 KG but less than 18,000 KG of Hashish;

• At least 600 KG but less than 1,800 KG of Hashish Oil;

• At least 30,000,000 units but less than 90,000,000 units of Ketamine;

• At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;

• At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.".

Section 2D1.1(c)(3) (as so redesignated) is amended by striking "Level 36" and inserting "Level 34".

Section 2D1.1(c)(4) (as so redesignated) is amended by striking "Level 34" and inserting "Level 32".

Section 2D1.1(c)(5) (as so redesignated) is amended by striking "Level 32" and inserting "Level 30"; and by inserting before the line referenced to Flunitrazepam the following:

" • 1,000,000 units or more of Schedule III Hydrocodone;".

Section 2D1.1(c)(6) (as so redesignated) is amended by striking "Level 30" and inserting "Level 28"; and in the line referenced to Schedule III Hydrocode by striking "700,000 or more" and inserting "At least 700,000 but less than 1,000,000".

Section 2D1.1(c)(7) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26".

Section 2D1.1(c)(8) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.1(c)(9) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.1(c)(10) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20"; and by inserting before the line referenced to Flunitrazepam the following:

" • 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);".

Section 2D1.1(c)(11) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18"; and in the line referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking "40,000 or more" and inserting "At least 40,000 but less than 60,000".

Section 2D1.1(c)(12) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.1(c)(13) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.1(c)(14) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue and inserting the following:

"(14) • Less than 10 G of Heroin; **Level 12**

• Less than 50 G of Cocaine;

• Less than 2.8 G of Cocaine Base;

• Less than 10 G of PCP, or

less than 1 G of PCP (actual);

• Less than 5 G of Methamphetamine, or

less than 500 MG of Methamphetamine (actual),

or less than 500 MG of 'Ice';

• Less than 5 G of Amphetamine, or

less than 500 MG of Amphetamine (actual);

• Less than 100 MG of LSD;

• Less than 4 G of Fentanyl;

• Less than 1 G of a Fentanyl Analogue;";

by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end [of] the following:

" • 80,000 units or more of Schedule IV substances (except Flunitrazepam).".

Section 2D1.1(c)(15) (as so redesignated) is amended by striking "Level 12" and inserting "Level 10"; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue; and in the line referenced to Schedule IV substances (except Flunitrazepam) by striking "40,000 or more" and inserting "At least 40,000 but less than 80,000".

Section 2D1.1(c)(16) (as so redesignated) is amended by striking "Level 10" and inserting "Level 8"; in the line referenced to Flunitrazepam by striking "At least 62 but less" and inserting "Less"; by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

" • 160,000 units or more of Schedule V substances.".

Section 2D1.1(c)(17) (as so redesignated) is amended to read as follows:

"(17) • Less than 1 KG of Marihuana; **Level 6**

• Less than 200 G of Hashish;

• Less than 20 G of Hashish Oil;

• Less than 1,000 units of Ketamine;

• Less than 1,000 units of Schedule I or II Depressants;

• Less than 1,000 units of Schedule III Hydrocodone;

• Less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);

• Less than 16,000 units of Schedule IV substances (except Flunitrazepam);

• Less than 160,000 units of Schedule V substances.".

The annotation to § 2D1.1(c) captioned "Notes to Drug Quantity Table" is amended in Note (E) by striking "100 G" and inserting "100 grams"; in Note (F) by striking "0.5 ml" and "25 mg" and inserting "0.5 milliliters" and "25 milligrams", respectively; and in Note (G) by striking "0.4 mg" and inserting "0.4 milligrams".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 8(A) by striking "1 gm", "5 kg", "100 gm", and "500 kg" and inserting "1 gram", "5 kilograms", "100 grams", and "500 kilograms", respectively, and by striking "28" and inserting "26"; in Note 8(B) by striking "999 grams" and inserting "2.49 kilograms"; in Note 8(C)(i) by striking "22" and inserting "20", by striking "18" and inserting "16", and by striking "24" and inserting "22"; in Note 8(C)(ii) by striking "8" both places such term appears and inserting "6", by striking "five kilograms" and inserting "10,000 units", and by striking "10" and inserting "8"; in Note 8(C)(iii) by striking "16" and inserting "14", by striking "14" and inserting "12", and by striking "18" and inserting "16"; in Note 8(C)(iv) by striking "56,000" and inserting "76,000", by striking "100,000" and inserting "200,000", by striking "200,000" and inserting "600,000", by striking "56" and inserting "76", by striking "59.99" and inserting "79.99", by striking "4.99" and inserting "9.99", by

striking "6.25" and inserting "12.5", by striking "999 grams" and inserting "2.49 kilograms", by striking "1.25" and inserting "3.75", by striking "59.99" and inserting "79.99", and by striking "61.99 (56 + 4.99 + .999)" and inserting "88.48 (76 + 9.99 + 2.49)"; in Note 8(D), under the heading relating to Schedule III Substances (except ketamine and hydrocodone), by striking "59.99" and inserting "79.99"; under the heading relating to Schedule III Hydrocodone, by striking "999.99" and inserting "2,999.99"; under the heading relating to Schedule IV Substances (except flunitrazepam) by striking "4.99" and inserting "9.99"; and under the heading relating to Schedule V Substances by striking "999 grams" and inserting "2.49 kilograms"; and in Note 9 by striking "500 mg" and "50 gms" and inserting "500 milligrams" and "50 grams", respectively.

The Commentary to § 2D1.1 captioned "Background" is amended in the paragraph that begins "The base offense levels in § 2D1.1" by striking "32 and 26" and inserting "30 and 24"; and by striking the paragraph that begins "The base offense levels at levels 26 and 32" as follows:

> "The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; *e.g.*, level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.",

and inserting the following new paragraph:

> "The base offense levels at levels 24 and 30 establish guideline ranges such that the

statutory minimum falls within the range; *e.g.*, level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.".

The Commentary to § 2D1.2 captioned "Application Note" is amended in Note 1 by striking "16" and inserting "14"; and by striking "17" and inserting "15".

Section 2D1.11(d) is amended by striking paragraph (14); by redesignating paragraphs (1) through (13) as paragraphs (2) through (14), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1)	9 KG or more of Ephedrine;	**Level 38**
	9 KG or more of Phenylpropanolamine;	
	9 KG or more of Pseudoephedrine.".	

Section 2D1.11(d)(2) (as so redesignated) is amended by striking "Level 38" and inserting "Level 36"; and by striking "3 KG or more" each place such term appears and inserting "At least 3 KG but less than 9 KG".

Section 2D1.11(d)(3) (as so redesignated) is amended by striking "Level 36" and inserting "Level 34".

Section 2D1.11(d)(4) (as so redesignated) is amended by striking "Level 34" and inserting "Level 32".

Section 2D1.11(d)(5) (as so redesignated) is amended by striking "Level 32" and inserting "Level 30".

Section 2D1.11(d)(6) (as so redesignated) is amended by striking "Level 30" and inserting "Level 28".

Section 2D1.11(d)(7) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26".

Section 2D1.11(d)(8) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.11(d)(9) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.11(d)(10) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20".

Section 2D1.11(d)(11) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18".

Section 2D1.11(d)(12) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.11(d)(13) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.11(d)(14) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; and by striking "At least 500 MG but less" each place such term appears and inserting "Less".

Section 2D1.11(e) is amended by striking paragraph (10); by redesignating paragraphs (1) through (9) as paragraphs (2) through (10), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1)	List I Chemicals	**Level 30**
	2.7 KG or more of Benzaldehyde;	
	60 KG or more of Benzyl Cyanide;	
	600 G or more of Ergonovine;	
	1.2 KG or more of Ergotamine;	
	60 KG or more of Ethylamine;	
	6.6 KG or more of Hydriodic Acid;	
	3.9 KG or more of Iodine;	
	960 KG or more of Isosafrole;	
	600 G or more of Methylamine;	
	1500 KG or more of N-Methylephedrine;	
	1500 KG or more of N-Methylpseudoephedrine;	
	1.9 KG or more of Nitroethane;	
	30 KG or more of Norpseudoephedrine;	
	60 KG or more of Phenylacetic Acid;	
	30 KG or more of Piperidine;	
	960 KG or more of Piperonal;	
	4.8 KG or more of Propionic Anhydride;	
	960 KG or more of Safrole;	
	1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;	

3406.5 L or more of Gamma-butyrolactone;

2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.".

Section 2D1.11(e)(2) (as so redesignated) is amended to read as follows:

"(2)	List I Chemicals	Level 28
	At least 890 G but less than 2.7 KG of Benzaldehyde;	
	At least 20 KG but less than 60 KG of Benzyl Cyanide;	
	At least 200 G but less than 600 G of Ergonovine;	
	At least 400 G but less than 1.2 KG of Ergotamine;	
	At least 20 KG but less than 60 KG of Ethylamine;	
	At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;	
	At least 1.3 KG but less than 3.9 KG of Iodine;	
	At least 320 KG but less than 960 KG of Isosafrole;	
	At least 200 G but less than 600 G of Methylamine;	
	At least 500 KG but less than 1500 KG of N-Methylephedrine;	

At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;

At least 625 G but less than 1.9 KG of Nitroethane;

At least 10 KG but less than 30 KG of Norpseudoephedrine;

At least 20 KG but less than 60 KG of Phenylacetic Acid;

At least 10 KG but less than 30 KG of Piperidine;

At least 320 KG but less than 960 KG of Piperonal;

At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;

At least 320 KG but less than 960 KG of Safrole;

At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;

At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or

Hypophosphorous Acid.

List II Chemicals

33 KG or more of Acetic Anhydride;

3525 KG or more of Acetone;

60 KG or more of Benzyl Chloride;

3225 KG or more of Ethyl Ether;

3600 KG or more of Methyl Ethyl Ketone;

30 KG or more of Potassium Permanganate;

3900 KG or more of Toluene.".

Section 2D1.11(e)(3) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26"; and, under the heading relating to List II Chemicals, by striking the line referenced to Acetic Anhydride and all that follows through the line referenced to Toluene and inserting the following:

" At least 11 KG but less than 33 KG of Acetic Anhydride;

At least 1175 KG but less than 3525 KG of Acetone;

At least 20 KG but less than 60 KG of Benzyl Chloride;

At least 1075 KG but less than 3225 KG of Ethyl Ether;

At least 1200 KG but less than 3600 KG of Methyl Ethyl Ketone;

At least 10 KG but less than 30 KG of Potassium Permanganate;

At least 1300 KG but less than 3900 KG of Toluene.".

Section 2D1.11(e)(4) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.11(e)(5) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.11(e)(6) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20".

Section 2D1.11(e)(7) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18".

Section 2D1.11(e)(8) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.11(e)(9) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.11(e)(10) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; and in each line by striking "At least" and all that follows through "but less" and inserting "Less".

The Commentary to § 2D1.11 captioned "Application Notes" is amended in Note 1(A) by striking "38" both places such term appears and inserting "36", and by striking "26" and inserting "24"; and in Note 1(B) by striking "32" and inserting "30".

The Commentary to § 3B1.2 captioned "Application Notes" is amended in Note 3(B) by striking "14" and inserting "12".

The Commentary following § 3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in Example 2 by striking "26" and inserting "24"; and by striking "28" each place such term appears and inserting "26".

The Commentary to § 5G1.3 captioned "Application Notes" is amended in Note 2(D) by striking "40" and inserting "90"; by striking "15" and inserting "25"; and by striking "55" and inserting "115".

Reason for Amendment: This amendment revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) incorporate the statutory mandatory minimum penalties for such offenses.

When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing

ranges for all drug quantities, *see* § 2D1.1, comment. (backg'd.), with a minimum base offense level of 6 and a maximum base offense level of 38 for most drug types.

This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. *See* 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code"); *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").

Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense

level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.

The amendment also makes parallel changes to the quantity tables in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), which apply to offenses involving chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide offense levels that are tied to, but less severe than, the base offense levels in § 2D1.1 for offenses involving the final product.

In considering this amendment, the Commission held a hearing on March 13, 2014, and heard expert testimony from the Executive Branch, including the Attorney General and the Director of the Federal Bureau of Prisons, defense practitioners, state and local law enforcement, and interested community representatives. The Commission also received substantial written public comment, including from the Federal judiciary, members of Congress, academicians, community organizations, law enforcement groups, and individual members of the public.

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve its stated purpose. Previously, the Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels [levels 26 and 32] to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." However,

changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.

In 1994, after the initial selection of levels 26 and 32, Congress enacted the "safety valve" provision, which applies to certain non-violent drug defendants and allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." *See* 18 U.S.C. § 3553(f). The guidelines incorporate the "safety valve" at § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and, furthermore, provide a 2-level reduction if the defendant meets the "safety valve" criteria. *See* § 2D1.1(b)(16).

These statutory and guideline provisions, which are unrelated to the guideline range's relationship to the mandatory minimum, provide adequate incentive to plead guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the "safety valve" than if they do not. In fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for the "safety valve" and a plea rate of 93.9 percent if they did not.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. Similar to this amendment, the Commission in 2007 amended the Drug Quantity Table for cocaine base ("crack" cocaine) so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32. *See* USSG App. C, Amendment 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111-220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively. For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under § 5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect. This recent experience indicates that this amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to

plead guilty or otherwise cooperate with authorities. *See* 28 U.S.C. § 991(b) (specifying that sentencing policies are to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

The amendment also reflects the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times—often in response to congressional directives—to provide a greater emphasis on the defendant's conduct and role in the offense rather than on drug quantity. The version of § 2D1.1 in the original 1987 Guidelines Manual contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 in effect at the time of this amendment contains fourteen enhancements and three downward adjustments (including the "mitigating role cap" provided in subsection (a)(5)). These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

The amendment was also motived by the significant overcapacity and costs of the Federal Bureau of Prisons. The Sentencing Reform Act directs the Commission to ensure that the sentencing guidelines are "formulated to minimize the likelihood that the

Federal prison population will exceed the capacity of the Federal prisons." *See* 28 U.S.C. § 994(g). Reducing the federal prison population and the costs of incarceration has become an urgent consideration. The Commission observed that the federal prisons are now 32 percent overcapacity, and drug trafficking offenders account for approximately 50 percent of the federal prison population (100,114 of 199,810 inmates as of October 26, 2013, for whom the Commission could determine the offense of conviction). Spending on federal prisons exceeds $6 billion a year, or more than 25 percent of the entire budget for the Department of Justice. The Commission received testimony from the Department of Justice and others that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs, all of which promote public safety.

In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons. Based on an analysis of the 24,968 offenders sentenced under § 2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457—or 69.9 percent—of drug trafficking offenders sentenced under § 2D1.1, and their average sentence will be reduced by 11 months—or 17.7 percent—from 62 months to 51 months. The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety. In particular, the Commission was informed by its studies that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. *See* USSG App. C, Amendment 713 (effective March 3, 2008). The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.

Furthermore, existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for drug trafficking offenders with small quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received testimony from several stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

Effective Date: The effective date of this amendment is November 1, 2014.

United States Sentencing Commission
Guidelines Manual
Supplement to Appendix C

Amendments to the Guidelines Manual

788. Amendment

Section 1B1.10, as amended by Amendment 780, is further amended in subsection (d) by striking "and" and by inserting ", and 782 (subject to subsection (e)(1))" before the period at the end;

and by adding at the end the following new subsection (e):

"(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.".

The Commentary to 1B1.10 captioned "Application Notes", as amended by Amendment 780, is further amended by redesignating Notes 6 and 7 as Notes 7 and 8, respectively;

and by inserting after Note 5 the following new Note 6:

"6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment

has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.".

Reason for Amendment: This amendment expands the listing in § 1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. The Commission has determined that Amendment 782, subject to the limitation in new § 1B1.10(e) delaying the effective date of sentence reduction orders until November 1, 2015, should be applied retroactively.

Amendment 782 reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties in § 2D1.1, and made parallel changes to § 2D1.11. Under the applicable standards set forth in the background commentary to § 1B1.10, the Commission considers the following factors, among others: (1) the purpose of the amendment, (2) the magnitude of the change in the

guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. *See* § 1B1.10, comment. (backg'd.). Applying those standards to Amendment 782, the Commission determined that, among other factors:

> (1) The purposes of the amendment are to reflect the Commission's determination that setting the base offense levels above mandatory minimum penalties is no longer necessary and that a reduction would be an appropriate step toward alleviating the overcapacity of the federal prisons. *See* 28 U.S.C. § 994(g) (requiring the Commission to formulate guidelines to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons").
>
> (2) The number of cases potentially involved is large, and the magnitude of the change in the guideline range is significant. The Commission determined that an estimated 46,000 offenders may benefit from retroactive application of Amendment 782 subject to the limitation in § 1B1.10(e), and the average sentence reduction would be approximately 18 percent.
>
> (3) The administrative burdens of applying Amendment 782 retroactively are significant but manageable given the one-year delay in the effective date, which allows courts and agencies more time to prepare. This determination was informed by testimony at the Commission's June 10, 2014 public hearing on retroactivity and by other public comment received by the Commission.

The Commission determined that public safety, among other factors, requires a limitation on retroactive application of Amendment 782. In light of the large number of cases potentially involved, the Commission determined that the agencies of the federal criminal justice system responsible for the offenders' reentry into society need time to prepare, and to help the offenders prepare, for that reentry. For example, the Bureau of Prisons has the responsibility under 18 U.S.C. § 3624(c) to ensure, to the extent practicable, that the defendant will spend a portion of his or her term of imprisonment under conditions that will afford the defendant a reasonable opportunity to adjust to and prepare for his or her reentry into the community. The Commission received testimony indicating that some offenders released pursuant to earlier retroactive guideline amendments had been released without having had this opportunity. In addition, for many of the defendants potentially involved, their sentence includes a term of supervised release after imprisonment. The judiciary and its probation officers will have the responsibility under 18 U.S.C. § 3624(e) to supervise those defendants when they are released by the Bureau of Prisons. The Commission received testimony from the Criminal Law Committee of the Judicial Conference of the United States that a delay would permit courts and probation offices to prepare to effectively supervise this increased number of defendants.

The Commission concluded that a one-year delay in the effective date of any orders granting sentence reductions under Amendment 782 is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized

determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all offenders who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit those agencies that will be responsible for offenders after their release to prepare for the increased responsibility. Therefore, the Commission added a Special Instruction at subsection (e) providing that a reduced term of imprisonment based on retroactive application of Amendment 782 shall not be ordered unless the effective date of the court's order is November 1, 2015, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before November 1, 2015, as long as any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later. As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.

In addition, public safety will be considered in every case because § 1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. *See* § 1B1.10, comment. (n.1(B)(ii)).

Effective Date: The effective date of this amendment is November 1, 2014.

No. 17-5716

IN THE

Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

18 U.S.C. § 3582(c)(2) authorizes a district court to reduce the sentence of a defendant who was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Petitioners committed various drug crimes that ordinarily carry mandatory minimum terms of imprisonment. But 18 U.S.C. § 3553(e) empowered the district court to impose shorter sentences here, "in accordance with the guidelines and policy statements," to reflect petitioners' substantial assistance to the authorities. After consulting the Guidelines—most notably, U.S.S.G. § 2D1.1 and § 5G1.1(b)—the district court imposed such shorter sentences.

The question presented is whether a defendant in petitioners' situation is eligible for Section 3582(c)(2) relief when the Guidelines are amended to recommend lower sentences in this situation—or whether, as the Eighth Circuit held, the Sentencing Commission is powerless to enable such relief on the ground that the defendant's original sentence was not "based on" a guidelines recommendation at all, but rather on the statutory mandatory minimum that would have applied if no substantial assistance motion had been granted.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
BRIEF FOR PETITIONERS 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY AND GUIDELINES PROVISIONS 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 15
ARGUMENT 18
I. The text of the Sentencing Reform Act dictates that petitioners are eligible under Section 3582(c)(2) to seek sentence reductions 18
A. Petitioners' original sentences were "based on" sentencing guidelines ranges derived from their offense levels under U.S.S.G. § 2D1.1 and their criminal history categories 20
B. Even if the Eighth Circuit were correct that petitioners' sentences were not based on ranges corresponding to their offense levels and criminal histories because of the influence of U.S.S.G. § 5G1.1, petitioners are still eligible for relief 25
II. The structure and objectives of the Sentencing Reform Act support enabling petitioners to seek sentence reductions 35

A. The Sentencing Commission has broad authority to determine who may benefit from retroactive amendments to the Guidelines 35

B. Allowing petitioners to seek sentence reductions is necessary to avoid unjustifiable sentencing disparities 38

CONCLUSION 43

TABLE OF AUTHORITIES

Page(s)

Cases

Alleyne v. United States,
570 U.S. 99 (2013) 30

Bell v. United States,
349 U.S. 81 (1955) 42

Bifulco v. United States,
447 U.S. 381 (1980) 42

Braxton v. United States,
500 U.S. 344 (1991) 36, 38

Busic v. United States,
446 U.S. 398 (1980) 42

Dillon v. United States,
560 U.S. 817 (2010) 24, 35, 36

Dorsey v. United States,
567 U.S. 260 (2012) ..... *passim*

Freeman v. United States,
564 U.S. 522 (2011) ..... *passim*

Gall v. United States,
552 U.S. 38 (2007) 3, 21

Kimbrough v. United States,
552 U.S. 85 (2007) 39

Melendez v. United States,
518 U.S. 120 (1996) 30

Michigan v. E.P.A.,
135 S. Ct. 2699 (2015) 36

Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017) 38

Mohawk Indus. v. Carpenter,
558 U.S. 100 (2009) 38

Peugh v. United States,
569 U.S. 530 (2013) 21, 22

Rita v. United States,
551 U.S. 338 (2007) 21

In re Sealed Case,
722 F.3d 361 (D.C. Cir. 2013) 28

Simpson v. United States,
435 U.S. 6 (1978) 42

Swint v. Chambers Cty. Comm'n,
514 U.S. 35 (1995) 38

United States v. Becton,
593 Fed. Appx. 469 (6th Cir. 2014) 31

United States v. Billue,
576 F.3d 898 (8th Cir. 2009) ..... *passim*

United States v. Bogdan,
835 F.3d 805 (8th Cir. 2016) 13

United States v. Booker,
543 U.S. 220 (2005) 30

United States v. Byers,
561 F.3d 825 (8th Cir. 2009) 26

United States v. C.D.,
848 F.3d 1286 (10th Cir. 2017) 18

United States v. Freeman,
586 Fed. Appx. 237 (7th Cir. 2014) 40, 41

United States v. Granderson,
511 U.S. 39 (1994) 42

United States v. Rodriguez-Soriano,
855 F.3d 1040 (9th Cir. 2017) 18

United States v. Williams,
808 F.3d 253 (4th Cir. 2015) 13, 18, 40

United States v. Wills,
35 F.3d 1192 (7th Cir. 1994) 30

United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820) 42

United States v. Winebarger,
664 F.3d 388 (3d Cir. 2011) 33, 34

United States v. Wren,
706 F.3d 861 (7th Cir. 2013) 42

Wade v. United States,
504 U.S. 181 (1992) 20, 26

Constitutional Provision

U.S. Const., amend. VI 30

Statutes

18 U.S.C. § 922(g)(1) 5
18 U.S.C. § 924(a)(2) 5
18 U.S.C. § 3553 2
18 U.S.C. § 3553(a)(4) 20
18 U.S.C. § 3553(a)(6) 39
18 U.S.C. § 3553(e) ..... *passim*
18 U.S.C. § 3553(f) 27
18 U.S.C. § 3582(a) 21
18 U.S.C. § 3582(c) 1, 10, 35, 37
18 U.S.C. § 3582(c)(2) ..... *passim*
21 U.S.C. § 841(a)(1) ..... *passim*
21 U.S.C. § 841(b)(1)(A) ..... *passim*
21 U.S.C. § 841(b)(1)(B) 6
21 U.S.C. § 841(c)(1) 7
21 U.S.C. § 841(c)(2) 7

21 U.S.C. § 846 ..... *passim*
21 U.S.C. § 851 ..... 4, 7
28 U.S.C. § 991(b)(1)(B) 39
28 U.S.C. § 994 ..... 2, 20, 28
28 U.S.C. § 994(a) 34
28 U.S.C. § 994(a)(2)(B) 35
28 U.S.C. § 994(a)(2)(C) 36
28 U.S.C. § 994(b) 21, 34
28 U.S.C. § 994(c) 34
28 U.S.C. § 994(n) 16, 27, 31, 32, 34
28 U.S.C. § 994(*o*) 1
28 U.S.C. § 994(u) 36
28 U.S.C. § 1254(1) 1
Federal Sentencing Guidelines Manual
U.S.S.G. app. C, amend. 570 29
U.S.S.G. app. C, amend. 780 ..... 11, 37, 38, 42
U.S.S.G. app. C, amend. 782 ..... *passim*
U.S.S.G. app. C, amend. 788 ..... 10, 11
U.S.S.G. § 1B1.1 3
U.S.S.G. § 1B1.1(a) 21
U.S.S.G. § 1B1.1(a)(1) 21
U.S.S.G. § 1B1.1(a)(2) 21
U.S.S.G. § 1B1.1(a)(3) 21
U.S.S.G. § 1B1.1(a)(4) 21
U.S.S.G. § 1B1.1(a)(5) 21
U.S.S.G. § 1B1.1(a)(6) 21
U.S.S.G. § 1B1.1(a)(7) 21
U.S.S.G. § 1B1.1(a)(8) 21

U.S.S.G. § 1B1.10 11
U.S.S.G. § 1B1.10(a) 10
U.S.S.G. § 1B1.10(b)(1) 24
U.S.S.G. § 1B1.10(c) ..... *passim*
U.S.S.G. § 1B1.10(d) 10, 11, 27, 36, 37
U.S.S.G. § 1B1.10(e) 10
U.S.S.G. § 2D1.1 ..... *passim*
U.S.S.G. § 5G1.1 ..... *passim*
U.S.S.G. § 5G1.1(b) ..... *passim*
U.S.S.G. § 5G1.2 ..... 11, 14
U.S.S.G. § 5G1.2(b) 6, 14
U.S.S.G. § 5K1.1 2

Legislative Materials

139 Cong. Rec. 27,842 (1993) (statement of Sen. Hatch) 29
H.R. Rep. No. 103-460 (1994) 28
Message from the President of the United States Transmitting the Drug Free America Act of 1986, H.R. Doc. 99-266 29

Other Authorities

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Merriam-Webster Dictionary (2004) 33
Public Hearings on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 13, 2014) 23

U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014 (Mar. 6, 2014) 16, 23

U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991) 28

BRIEF FOR PETITIONERS

Petitioners Timothy D. Koons et al. respectfully request that this Court reverse the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit (J.A. 44) is published at 850 F.3d 973. The opinion of the district court in Feauto's case (J.A. 57) is published at 146 F. Supp. 3d 1022. The order of the district court in the other petitioners' cases (J.A. 96) is unpublished.

JURISDICTION

The Eighth Circuit entered its judgment on March 10, 2017. J.A. 45. The Eighth Circuit denied a timely petition for rehearing on May 25, 2017. *Id.* 98-100. The petition for a writ of certiorari was filed on August 22, 2017 and granted on December 8, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

18 U.S.C. § 3582(c) provides: "The court may not modify a term of imprisonment once it has been imposed except that— . . . (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with

applicable policy statements issued by the Sentencing Commission."

The other relevant statutory provisions—namely, 18 U.S.C. § 3553 and 28 U.S.C. § 994—are set forth in the Joint Appendix at pages 221-41.

The relevant provisions of the Federal Sentencing Guidelines Manual are set forth in the Joint Appendix at pages 242-95.

STATEMENT OF THE CASE

This is a consolidated appeal brought by five defendants (collectively, "petitioners") who were convicted between 2008 and 2014 of federal drug crimes. In each case, the district court imposed a sentence that was below an otherwise applicable statutory minimum after granting a "substantial assistance" departure under 18 U.S.C. § 3553(e). In so doing, the judge used the United States Sentencing Guidelines to calculate not just how to account for petitioners' cooperation with authorities, *see* U.S.S.G. § 5K1.1, but also how to measure and account for the seriousness of petitioners' offenses.

The Sentencing Commission subsequently amended the Guidelines to lower the offense levels in drug cases such as these. The Commission also made this amendment retroactive. Finally, it made clear that the amended guidelines range for cooperators such as petitioners should be calculated without regard to the mandatory minimums that the Government's substantial assistance motion rendered inapplicable.

Petitioners now seek sentence reductions pursuant to 18 U.S.C. § 3582(c)(2). That statute empowers district courts to reduce a defendant's

sentence when his original sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *Id.* Although the Government agreed below that the district court had the statutory authority to grant petitioners' requests, the court held to the contrary. The Eighth Circuit affirmed.

1. Each of the five petitioners was convicted of a federal drug crime (or crimes) and originally sentenced as follows:

a. In 2010, petitioner Timothy Koons pleaded guilty to two charges: (1) conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; and (2) possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Koons Plea Agreement ¶ 1.[1] As in all federal criminal cases, the Sentencing Guidelines provided an "advisory" sentence. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 46 (2007). In particular, the Guidelines supplied a "guideline range" that "corresponds to the offense level and criminal history category," along with any required adjustments or otherwise relevant considerations. *See* U.S.S.G. § 1B1.1.

Accordingly, Koons' plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." Koons

[1] The plea agreements cited here and later in this brief are under seal. Petitioners have filed a motion to file them under seal in this Court in the Supplemental Joint Appendix.

Plea Agreement ¶ 15. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Counts 1 and 2, pursuant to USSG § 2D1.1, the appropriate base offense level is at least 34 based upon defendant's involvement with at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine which contained at least 150 grams of actual (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶ 17. After receiving the presentence report and making further calculations and adjustments, the district court determined that Koons' offense level was 31 and that his criminal history category was IV. J.A. 114-15. These factors yielded a guidelines range of 151 to 188 months. *Id.*

Koons' offense conduct and prior record also subjected him to a statutory minimum sentence of 240 months in prison. J.A. 115; *see* 21 U.S.C. § 841(b)(1)(A); *id.* § 851. Under Eighth Circuit law, that meant that U.S.S.G. § 5G1.1 applied in his case. *See United States v. Billue*, 576 F.3d 898, 904-05 (8th Cir. 2009). U.S.S.G. § 5G1.1 provides that "[w]here a statutorily required minimum sentence is greater than the maximum applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b). Applying this guideline, the district court adjusted Koons' guidelines calculation to 240 months. J.A. 115.

The statutory mandatory minimum itself, however, was "waived" here, U.S.S.G. § 2D1.1 cmt. n.24, because Koons had provided substantial assistance to the Government. Under 18 U.S.C. § 3553(e), courts, upon motion of the Government, may "impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance."

Taking U.S.S.G. § 5G1.1(b)'s guidelines sentence of 240 months as its anchor, the district court found that a sentence 25% below the statutory minimum was appropriate in Koons' case. J.A. 116. It therefore sentenced him to 180 months in prison, to be followed by 10 years of supervised release. *Id.* 116, 118.

b. In 2013, petitioner Randy Feauto pleaded guilty to two charges: (1) conspiracy to manufacture methamphetamine and to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; and (2) unlawful possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Feauto Plea Agreement ¶ 1. Feauto's plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." *Id.* ¶ 16. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Count 1, pursuant to USSG § 2D1.1, the appropriate base offense level is at least 32 based upon defendant's involvement with at least 50 grams of actual

> (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶ 18.

After receiving the presentence report and making further calculations and adjustments, the district court determined that Feauto's criminal offense level was 33 and that his criminal history category was III. J.A. 58 n.1, 148. Those factors yielded a guidelines range of 168 to 210 months in prison. *Id.* The district court then adjusted his guidelines sentence under U.S.S.G. § 5G1.2(b) to 240 months, to reflect a mandatory minimum corresponding to his offense conduct and prior record. *Id.* 58 n.1, 148.

In light of Feauto's substantial assistance and the Government's motion under Section 3553(e), the mandatory minimum did not apply. Accordingly, the district court then departed downward, finding that a 45% reduction from the otherwise applicable statutory minimum was appropriate. J.A. 58 n.1, 153. The court sentenced Feauto to 132 months in prison, to be followed by 10 years of supervised release. *Id.* 154.

c. In 2014, petitioner Jose Manuel Gardea pleaded guilty to a single count of conspiracy to distribute 5 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. Gardea Plea Agreement ¶ 1. Gardea's plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." *Id.* ¶ 15. The agreement further stipulated, among other things, that "the

United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Count 1, pursuant to USSG § 2D1.1, the appropriate base offense level is at least 26 based upon defendant's involvement with at least 5 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶17.

After receiving the presentence report and making further calculations and adjustments, the district court determined that his criminal offense level was 23 and that his criminal history category was IV. J.A. 197. Those factors yielded a guidelines range of 70 to 87 months in prison. *Id.* The district court then adjusted his guidelines sentence under U.S.S.G. § 5G1.1 to 120 months, to reflect a mandatory minimum corresponding to his offense conduct and prior record. *Id.*

In light of the Government's motion under Section 3553(e) for a downward departure to reflect Gardea's substantial assistance, the statutory minimum did not apply. Accordingly, the district court departed downward, finding that a 30% reduction from the inapplicable statutory minimum was appropriate. J.A. 198. It sentenced Gardea to 84 months in prison, to be followed by 8 years of supervised release. *Id.* 198-99.

d. In 2008, petitioner Kenneth Jay Putensen pleaded guilty to conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(c)(1)-(2), 846, and 851. Putensen Plea Agreement ¶ 1. Putensen's plea

agreement provided that "the district court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* ¶ 12. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied as follows":

> **Drug Base Offense Level (Chapter 2)**: For *Count 1*, the parties stipulate and agree that pursuant to USSG § 2D1.1, the appropriate base offense level is at least 34 based upon the defendant's involvement in at least 150 grams of actual (pure) methamphetamine.

Id. ¶ 14.

After receiving the presentence report and making further calculations and adjustments, the district court determined that his criminal offense level was 34 and that his criminal history category was III. J.A. 158. Those factors yielded a guidelines range of 188 to 235 months in prison. Putensen PSR ¶ 83. The district court then adjusted his guideline sentence under U.S.S.G. § 5G1.1 to life in prison, to reflect a mandatory minimum corresponding to his offense conduct and prior record. J.A. 158.

The Government moved under Section 3553(e) for a downward departure due to Putensen's substantial assistance, so the statutory minimum did not apply. Accordingly, the district court departed downward from a life term (which it translated under the Guidelines to 406 months), finding that a 35% reduction from the inapplicable statutory minimum was appropriate. J.A. 167-68, 177. The court sentenced Putensen to 264 months in prison, to be

followed by 10 years of supervised release. *Id.* 177-78. The district court deemed this sentence "higher" than necessary to effectuate the purposes of sentencing. *Id.* But it believed it was precluded at the time from imposing anything lower. *Id.* 176-77.

In early 2017, while this matter has been pending on appeal, Putensen's sentence was commuted to 188 months in prison.

e. In 2014, petitioner Esequiel Gutierrez pleaded guilty to conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Gutierrez Plea Agreement ¶ 1. Gutierrez's plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." *Id.* ¶ 16. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Count 1, pursuant to USSG § 2D1.1, the appropriate base offense level is **at least 32** based upon defendant's involvement with at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine, which contained 50 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶ 18.

After receiving the presentence report and making further calculations and adjustments, the

district court determined that his criminal offense level was 31, and his criminal history category was IV. J.A. 216. Those factors yielded a guidelines range of 188 to 235 months in prison. *Id.* The district court then adjusted his guidelines sentence anchor under U.S.S.G. § 5G1.1 to 240 months, to reflect a mandatory minimum corresponding to his offense conduct and prior record. J.A. 216. The district court next decided that an "upward variance" to 300 months was appropriate because the judge believed "[t]he advisory guidelines range d[id] not take into account" certain aspects of Gutierrez's criminal conduct. *Id.*

As in the other cases, the Government filed a substantial assistance motion under Section 3553(e), so the statutory minimum did not apply to Gutierrez. The district court thus "depart[ed] downward from 300 months down to 192 months" (a 36% reduction) in prison, to be followed by 10 years of supervised release. J.A. 218.

2. On November 1, 2014, Amendment 782 to the Guidelines became effective. U.S.S.G. app. C, amend. 782 (Supp. 2016). This provision amended U.S.S.G. § 2D1.1, which established the offense levels for petitioners' drug crimes. Specifically, Amendment 782 "reduce[d] by two levels the offense levels assigned to the [drug] quantities that trigger the statutory mandatory minimum penalties." *Id.* app. C., amend. 782, reason for amend.

The Sentencing Commission also made Amendment 782 retroactive. *See* U.S.S.G. app. C, amend. 788 (Supp. 2016). This allowed eligible defendants who were sentenced before the Amendment's effective date to seek sentence reductions under 18 U.S.C. § 3582(c). *See* U.S.S.G.

§ 1B1.10(a), (d), (e).[2] Finally, part of what this brief will call Amendment 782's "retroactivity package" applied the sentence recalculation methodology in Amendment 780 to cooperators like petitioners. *See* U.S.S.G. § 1B1.10(d), ***as amended by*** U.S.S.G. app. C, amend. 788 (Supp. 2016). Enacted simultaneously with Amendment 782, Amendment 780 inserted the following explanation in U.S.S.G. § 1B1.10 (the policy statement governing reductions of terms of imprisonment as a result of amended guidelines ranges):

> (c) ***Cases Involving Mandatory Minimum Sentences and Substantial Assistance.***—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined ***without regard to the operation of § 5G1.1*** (Sentencing on a Single Count of Conviction) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

U.S.S.G. § 1B1.10(c) (emphasis added). Under this methodology, petitioners' amended guidelines ranges are all substantially lower than the Guidelines provided before Amendment 782. J.A. 48-49, 69.

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[2] The effective date of any such sentence modification orders under Amendment 782 was November 1, 2015 or later. U.S.S.G. app. C, amend. 788 (Supp. 2016).

3. In 2015, the district court issued orders directing petitioners and the Government to address whether petitioners should receive sentence reductions pursuant to Section 3582(c)(2). J.A. 61 n.3. Petitioners contended they were eligible under the statute and Amendment 782 for reductions and requested lower sentences. *Id.* 57-59. The Government agreed that petitioners were eligible for reductions, as did the Federal Defender for the Northern and Southern Districts of Iowa, appearing as *amicus curiae*. *Id.*

The district court, however, rejected this unanimous position of the parties and *amicus*. The court recognized that "[t]he parties appear to be correct" that Amendment 782 and its retroactivity package render defendants in petitioners' position eligible for sentence reductions. But the district court held that "the *application* of Amendment 782, as called for in the pertinent policy statements in the Sentencing Guidelines, exceeds the Sentencing Commission's statutory authority and/or violates the nondelegation doctrine." J.A. 70; *see also id.* 71, 93. In particular, the district court reasoned that the Sentencing Commission lacks the statutory authority to instruct that defendants who received sentences below mandatory minimums pursuant to substantial assistance motions obtain sentence modifications according to amended sentencing ranges that are not anchored to the mandatory minimums that their cooperation rendered inapplicable. *Id.* 75-76.

Because its analysis and conclusion were "at odds with those of both the defendant[s] and the Department of Justice," the district court "strongly encourage[d]" petitioners to appeal. J.A. 95, 97.

4. On appeal, the Government again joined petitioners in arguing that they are eligible for sentence reductions pursuant to Section 3582(c)(2). J.A. 50-51. The parties also pointed to the intervening decision in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015), in which the Fourth Circuit held that defendants like petitioners are eligible for relief under Section 3582(c)(2). J.A. 51. But the Eighth Circuit disagreed and affirmed the district court's statutory holding to the contrary.[3] *Id.* 53, 56.

The court of appeals observed that a "threshold" requirement for a sentencing reduction under Section 3582(c)(2) is that a defendant must have been originally sentenced "based on" a guidelines sentencing range. J.A. 51 (emphasis omitted) (first quoting *United States v. Bogdan*, 835 F.3d 805, 807 (8th Cir. 2016); second quoting 18 U.S.C. § 3582(c)(2)); *see also Freeman v. United States*, 564 U.S. 522 (2011). In the court of appeals' view, that requirement is not satisfied here.

The Eighth Circuit acknowledged that the district court—as it was required to do—consulted each petitioner's guidelines range derived from his offense level and criminal history. J.A. 46-47. Under Eighth Circuit law, "[w]hen the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the

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[3] The court of appeals "d[id] not address" the district court's nondelegation doctrine holding, J.A. 50 n.1, and the Government did not defend it in its brief in opposition. The issue is therefore not before this Court.

mandatory minimum sentence, the court must use the mandatory minimum as the starting point." J.A. 52 (citing *Billue*, 576 F.3d at 904-05). The Eighth Circuit has derived this rule, too, from a guideline—specifically, U.S.S.G. § 5G1.1(b). *See Billue*, 576 F.3d at 904-05. That provision instructs that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b).[4]

The Eighth Circuit nevertheless held here that the district court's consultation of each petitioner's guidelines range derived from his offense level and criminal history did not make petitioners' sentences "based on" guidelines recommendations. *See* J.A. 52, 56. Nor, according to the Eighth Circuit, did the influence of U.S.S.G. § 5G1.1 under circuit law render petitioners' sentence "based on" guidelines recommendations. *Id.* 55. The Eighth Circuit reasoned that the Sentencing Commission in this situation lacks the statutory authority to establish guidelines sentences below otherwise applicable mandatory minimums. *Id.* Accordingly, the Eighth Circuit deemed it unduly "artificial," or "fictional," to say petitioners' original sentences were based on any guidelines ranges, as opposed to the statutory mandatory minimums that were inapplicable because

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[4] A second subsection of Chapter 5, Part G technically applies when the defendant has been convicted of multiple counts, as Koons and Feauto were. *See* U.S.S.G. § 5G1.2(b). But as relevant to this case, that subsection operates the same way as U.S.S.G. § 5G1.1(b). *See Id.* § 5G1.2 cmt. n.3. For simplicity, therefore, petitioners refer in the remainder of this brief solely to U.S.S.G. § 5G1.1(b).

the district court granted substantial assistance motions. *Id.*

5. The Eighth Circuit denied rehearing, J.A. 98-100, and this Court granted certiorari, 138 S. Ct. ___ (2017).

SUMMARY OF ARGUMENT

A defendant who, after providing substantial assistance to authorities, received a sentence below an otherwise applicable mandatory minimum pursuant to 18 U.S.C. § 3553(e) is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) where, as here, the Sentencing Commission has retroactively lowered the defendant's advisory guidelines range.

I. A defendant is eligible under Section 3582(c)(2) for a sentence reduction if he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). A defendant's original sentence was "based on" a guidelines range if the district court necessarily consulted that range in crafting the defendant's sentence.

Such is the case here. For each petitioner, the district court calculated a guidelines range according to his offense level under U.S.S.G. § 2D1.1 and criminal history category—a range the Sentencing Commission has since retroactively lowered by amending U.S.S.G. § 2D1.1. Indeed, the court had to calculate these original ranges: "The correct application of sentencing law requires a district court that has granted a § 3553(e) motion for a reduced sentence to consider the properly calculated § 2D1.1 range when determining the appropriate sentence."

U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 4 (Mar. 6, 2014).[6] That U.S.S.G. § 2D1.1 range necessarily forms a foundation for each sentence the judge ultimately imposes.

Even if the Eighth Circuit were correct that petitioners' original sentences were not "based on" their U.S.S.G. § 2D1.1 ranges because U.S.S.G. § 5G1.1 required the district court to adjust the Guidelines' recommended sentences upward to the statutory minimums that would have applied absent their substantial assistance, petitioners are still eligible for relief. To repeat: a substantial assistance motion under Section 3553(e) renders an otherwise binding statutory minimum inapplicable. And 28 U.S.C. § 994(n) explicitly empowers the Sentencing Commission in this situation to recommend imposing a sentence "that is lower than established by statute as a minimum sentence." So even if U.S.S.G. § 5G1.1 required petitioners' original guidelines sentences to be pegged to statutory minimums (and then reduced from those levels), that directive was a function of *the Guidelines*, not the statutory minimums themselves. And the Sentencing Commission has now changed the Guidelines in this respect: In conjunction with enacting Amendment 782 and making it retroactive, the Commission made clear that defendants' amended guidelines ranges should be calculated

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[6] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

"without regard to the operation of § 5G1.1." U.S.S.G. § 1B1.10(c). That being so, no matter how one approaches this case, petitioners' sentences were based on guidelines ranges that have subsequently been lowered.

II. The structure and objectives of the Sentencing Reform Act reinforce petitioners' eligibility for sentence reductions under Section 3582(c)(2). Several provisions in the Act assign the Sentencing Commission primary responsibility for determining whether, and under what circumstances, defendants are eligible for such reductions. After collecting written testimony, holding public hearings, and being assured by the Department of Justice it was a wise and proper thing to do, the Commission exercised that authority in Amendment 782 and its accompanying retroactivity package. The Commission's determinations warrant the judiciary's full respect.

Deeming petitioners eligible for sentence reductions under Section 3582(c)(2) is also essential to avoid new and unwarranted sentencing disparities. No one disputes that defendants who received sentences for drug crimes below otherwise applicable statutory minimums because of their substantial assistance—but whose guidelines ranges based on their offense levels and criminal history categories were *above* those statutory minimums—are eligible under Amendment 782 for sentence reductions. In light of this fact, it would be perverse to exclude defendants such as petitioners—who are identically situated except for having had guidelines ranges based on their offense levels and criminal history categories that were *below* inapplicable statutory minimums—from the ambit of Section

3582(c)(2). If anything, such defendants are more deserving of lower sentences.

ARGUMENT

For several years, the Government maintained that the Sentencing Commission acted within its statutory powers in providing that defendants in petitioners' situation "are eligible for sentence reductions under 18 U.S.C. § 3582(c)(2)." U.S. C.A. Koons Br. 6.[6] The Government's previous position, which it abandoned for the first time in its brief in opposition in this case, is correct.

I. The text of the Sentencing Reform Act dictates that petitioners are eligible under Section 3582(c)(2) to seek sentence reductions.

A federal prisoner is eligible under Section 3582(c)(2) for a sentence reduction if he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

In *Freeman v. United States*, 564 U.S. 522 (2011), this Court considered "whether defendants who enter into [Fed. R. Crim. P.] 11(c)(1)(C) [plea] agreements that specify a particular sentence may be said to have been sentenced 'based on' a Guidelines sentencing range, making them eligible for relief

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[6] For other cases in which the Government took this position, see *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015); *United States v. Rodriguez-Soriano*, 855 F.3d 1040 (9th Cir. 2017), *petition for cert. filed*, No. 17-6292 (Oct. 6, 2017); and *United States v. C.D.*, 848 F.3d 1286 (10th Cir. 2017), *petition for cert. filed*, No. 16-9672 (June 20, 2017).

under § 3582(c)(2)." 564 U.S. at 527 (plurality opinion). No majority coalesced around a single, precise definition of the statutory phrase "based on" in the Rule 11(c)(1)(C) context. But all Justices agreed that a sentence was "based on" a guidelines range when the judge needed to consult the Guidelines to determine the defendant's sentence. *See id.* at 530 (plurality opinion) (sentence is "based on" the guidelines "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence"); *see also id.* at 535 (Sotomayor, J., concurring in the judgment) ("To ask whether a particular term of imprisonment is 'based upon' a Guidelines sentencing range is to ask whether that range serves as the basis or foundation for the term of imprisonment."); *id.* at 545 (Roberts, C.J., dissenting) (suggesting that a sentence would be "based on" a guidelines calculation if the judge "needed to consult" that calculation).

This "needed to consult" touchstone is sufficient to resolve this case. The district court needed to (and did) consult petitioners' sentencing ranges corresponding to their offense levels under U.S.S.G. § 2D1.1 and criminal history categories in crafting their sentences. And even if the Eighth Circuit was correct in focusing instead on guidelines sentences that resulted from also applying U.S.S.G. § 5G1.1 to adjust petitioners' recommended sentences to the mandatory minimums that would have applied absent their substantial assistance, those adjusted calculations driven by Section 5G1.1 were also sentencing ranges the sentencing court needed to (and did) consult in crafting petitioners' sentences.

A. Petitioners' original sentences were "based on" sentencing guidelines ranges derived from their offense levels under U.S.S.G. § 2D1.1 and criminal history categories.

When the Government asked the district court to give petitioners shorter sentences than otherwise applicable mandatory minimums so as to reflect their substantial assistance to authorities, the plain language of 18 U.S.C. § 3553(e) required the sentencing judges to consult the guidelines ranges derived from petitioners' offense levels under U.S.S.G. § 2D1.1 and their criminal histories to determine their sentences. By amending Guideline 2D1.1 in Amendment 782, the Sentencing Commission has now lowered those ranges.

1. Section 3553(e) "empowers district courts, '[u]pon motion of the Government,' to impose a sentence below the statutory minimum to reflect a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.'" *Wade v. United States*, 504 U.S. 181, 182 (1992) (quoting 18 U.S.C. § 3553(e)). The statute further provides, in terms critical to the case at hand: "Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." 18 U.S.C. § 3553(e). Accordingly, Congress has directed sentencing courts in the precise situation at issue to impose sentences "in accordance with the guidelines." *Id.*; *see also id.* § 3553(a)(4) ("The court, in determining the particular sentence to be imposed, shall consider—. . . the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in

the guidelines."); *id.* § 3582(a) (The court "shall consider the factors set forth in section 3553(a) to the extent they are applicable . . . .").

2. The Guidelines themselves—and the methodology the district court followed in imposing the sentences at issue here—confirm that petitioners' sentences were based on guidelines ranges derived from their offense levels under U.S.S.G. § 2D1.1 and criminal history categories.

The Guidelines set forth an eight-step procedure for calculating the "guideline range" that applies in any given case. U.S.S.G. § 1B1.1(a); *see also* 28 U.S.C. § 994(b). The first seven steps involve determining the defendant's offense level and criminal history category. *See* U.S.S.G. § 1B1.1(a)(1)-(7). Those two factors yield "the guideline range in Part A of Chapter Five that corresponds to the [defendant's] offense level and criminal history category." *Id.* § 1B1.1(a)(7). The eighth step requires the court to determine whether any other sentencing requirement constricts or alters the "particular guideline range." *Id.* § 1B1.1(a)(8).

Through this procedure, "[t]he Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion." *Freeman*, 564 U.S. at 529 (plurality opinion). Therefore, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007) (citing *Rita v. United States*, 551 U.S. 338, 347-48 (2007)). That is, a sentencing judge is always "required to consult the Guidelines." *Peugh v. United States*, 569 U.S. 530, 536 (2013). "Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses

the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence.'" *Id.* at 542 (emphasis omitted) (quoting *Freeman*, 564 U.S. at 529 (plurality opinion)).

The parties and the district court followed this procedure in all of the cases here. In each petitioner's plea agreement, the parties acknowledged that "the United States Sentencing Guidelines should be applied" in these cases. *E.g.*, Koons Plea Agreement ¶ 17.[7] The parties further stipulated, among other things, that each petitioner's base offense level should be computed according to the levels assigned to drug quantities in U.S.S.G. § 2D1.1. *E.g.*, *id.*

For each petitioner, the district court then calculated and considered the guidelines range that flowed from each petitioner's offense level under U.S.S.G. § 2D1.1 and criminal history category. *See supra* at 4-10. Eighth Circuit precedent then required the district court to make an adjustment under step eight, to account for the statutory minimum sentences that would have applied but for petitioners' substantial assistance. *See United States v. Billue*, 576 F.3d 898, 904-05 (8th Cir. 2009). But whatever the correctness and import of that action (*see infra* Part I.B), it does not change the fact that the district judge calculated and consulted the guidelines ranges that corresponded to each petitioner's offense level under U.S.S.G. § 2D1.1 and used those ranges as "the beginning point" of its sentencing process. *Peugh*, 569 U.S. at 542 (quoting *Freeman*, 564 U.S. at 529

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[7] Each petitioner's plea agreement is identical insofar as discussed in this paragraph. *See supra* at 3-9.

(plurality opinion)); *see also supra* at 3-10 (describing petitioners' sentencing proceedings). And the court was required to do so: "The correct application of sentencing law requires a district court that has granted a § 3553(e) motion for a reduced sentence to consider the properly calculated § 2D1.1 range when determining the appropriate sentence." U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 4 (Mar. 6, 2014).[8]

Indeed, for three of the five petitioners, the U.S.S.G. § 2D1.1 guidelines ranges turned out to be not just the starting points for their sentencings but the endpoints as well: The sentences for Koons, Gardea, and Gutierrez fell within those guidelines ranges. *See supra* at 4, 7, 10. (Putensen's original sentence was above his range, though it was later commuted to within his range, and Feauto's was below. *See supra* at 6, 8-9.) This convergence is not surprising. When a judge selects a sentence under Section 3553(e), the judge "probably at least has in his or her mind" what the defendant's guidelines range is "absent the mandatory minimum." *Public Hearings on Proposed Amendments to the Federal Sentencing Guidelines* 255 (Mar. 13, 2014) (statement of Robert Zauzmer, on behalf of U.S. Dep't of Justice). In other words, there can be no denying the magnetic pull in this setting of the applicable U.S.S.G. § 2D1.1 ranges.

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[8] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

Petitioner Gutierrez's sentencing hearing provides a particularly vivid example of this effect. After finding that Gutierrez's guidelines range based on his offense level and criminal history category was 188 to 235 months, the district court noted that he was also subject to a 240-month mandatory minimum. J.A. 216. But in conjunction with granting the government's substantial assistance motion, the judge returned to the Guidelines to determine Gutierrez's sentence. The judge selected 300 months as an anchor for his substantial assistance departure because the "advisory guidelines range d[id] not take into account" the full range of Gutierrez's conduct. *Id.* The judge then departed downward to 192 months—a sentence within Gutierrez's original range. *Id.* 218.

3. Finally, there can be no doubt that the Sentencing Commission "subsequently . . . lowered" the guidelines ranges that applied to petitioners, as required by 18 U.S.C. § 3582(c)(2). A defendant's guidelines range has been lowered when the guidelines calculation from the initial sentencing is higher than "'the amended guideline range that would have been applicable to the defendant' had the relevant amendment been in effect at the time of the initial sentencing." *Dillon v. United States*, 560 U.S. 817, 827 (2010) (quoting U.S.S.G. § 1B1.10(b)(1)).

That test is satisfied here. The district court at petitioners' original sentencings applied then-prevailing offense levels in U.S.S.G. § 2D1.1 that corresponded to the drug quantities involved in petitioners' crimes. Amendment 782 reduced all of those offense levels by two levels. U.S.S.G. app. C, amend. 782, reason for amend. (Supp. 2016). That being so, petitioners are eligible for sentence modifications under Section 3582(c)(2).

B. Even if the Eighth Circuit were correct that petitioners' sentences were not based on ranges corresponding to their offense levels and criminal histories because of the influence of U.S.S.G. § 5G1.1, petitioners are still eligible for relief.

The Eighth Circuit acknowledged that the district court considered each petitioner's "guidelines range," meaning the ranges that flowed from each petitioner's offense level under U.S.S.G. § 2D1.1 and his criminal history. *See* J.A. 46-48. But the court of appeals refused to treat petitioners' sentences for purposes of Section 3582(c)(2) as "based on" those guidelines ranges. J.A. 52. This is because when petitioners were sentenced, Eighth Circuit law held that U.S.S.G. § 5G1.1 applied in substantial assistance cases such as petitioners'. J.A. (citing *Billue*, 576 F.3d at 904-05). And the district court here indeed adjusted petitioners' "guidelines sentence[s]" under U.S.S.G. § 5G1.1(b) before departing downward to account for their substantial assistance. J.A. 46; *see also id.* 48-49.

Guideline 5G1.1 sets forth rules for adjusting guidelines ranges when necessary to account for statutory mandatory minimums. Subsection (b)—the subsection Eighth Circuit law deemed applicable here—provides: "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b). Consequently, the Eighth Circuit believed that "[t]he ultimate 'guidelines range'" for petitioners was "the statutory mandatory minimum" that would have applied if they had not given substantial assistance. *Billue*, 576

F.3d at 904 (quoting *United States v. Byers*, 561 F.3d 825, 826-27 (8th Cir. 2009)).

This appears to be an improper interpretation of the Guidelines. Guideline 5G1.1(b) applies only where there is "a statutorily *required* minimum sentence." U.S.S.G. § 5G1.1(b) (emphasis added). And the whole point of substantial assistance motions under Section 3553(e) is that they allow an offender to "escape" an otherwise binding statutory minimum. *Dorsey v. United States*, 567 U.S. 260, 285 (2012); *see also Wade v. United States*, 504 U.S. 181, 182 (1992) (substantial assistance motions "empower[] district courts . . . to impose a sentence *below* the statutory minimum" (emphasis added)). In other words, where a court grants a substantial assistance motion, there is no statutory minimum sentence that is "required."

But even assuming the Eighth Circuit is correct that when petitioners were originally sentenced, U.S.S.G. § 5G1.1(b) instructed district courts to tether sentences in these circumstances to the mandatory minimum that would have applied absent the substantial assistance motion, it does not matter. Part of Amendment 782's retroactivity package provides that if the case "involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities," then the defendant's amended guidelines range "shall be determined *without regard to the operation of § 5G1.1.*" U.S.S.G. § 1B1.10(c) (emphasis added); *see also* U.S.S.G. § 1B1.10(d) (applying this provision to Amendment 782). Applying this methodology here results in all petitioners having lower sentencing

ranges than the district court used at their original sentencings—just as Section 3582(c)(2) requires.

The Eighth Circuit, in fact, "accept[ed]" that, even under its view of the Guidelines, the Commission has lowered petitioners' guidelines ranges. *See* J.A. 50 n.1. But the court of appeals still held that petitioners are not eligible for relief under Section 3582(c)(2). This is so, the Eighth Circuit reasoned, because each petitioner's *original* "guidelines range" set according to U.S.S.G. § 5G1.1 necessarily "depended upon the mandatory minimum." J.A. 52. The Commission, according to the Eighth Circuit, had to set cooperators' sentences "at the mandatory minimum before considering a substantial assistance departure." *Id.* Therefore, the court of appeals continued, it would be entirely "artificial," or "fictional," to say that petitioners' original sentences were "based on" the guidelines calculations set according to U.S.S.G. § 5G1.1(b), as opposed to the statutory mandatory minimums themselves. J.A. 55.

This reasoning might be correct in the mine-run of cases, when defendants have not given substantial assistance (or are not otherwise exempt from a mandatory minimum, *see* 18 U.S.C. § 3553(f)). But ***when defendants have given substantial assistance*** that resulted in the government filing a Section 3553(e) motion, the Eighth Circuit's reasoning cannot be squared with 18 U.S.C. § 3553(e) or 28 U.S.C. § 994(n).

1. Recall that Section 3553(e)—a federal statute, just like the otherwise binding mandatory minimum—gives district courts "the authority to impose a sentence *below* a level established by statute as a minimum sentence so as to reflect a

defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e) (emphasis added). Critically, the statute adds: "Such sentence shall be imposed *in accordance with the guidelines and policy statements* issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." *Id.* (emphasis added). The plain language of Section 3553(e) therefore instructs that upon granting substantial assistance motions, courts must consult the Guidelines to impose sentences "below a level established by statute as a minimum sentence."

Numerous other sources confirm this analysis. For starters, this Court has explained that once trial courts grant substantial assistance motions, defendants "are relieved of application of a mandatory minimum." *Dorsey*, 567 U.S. at 285. Or, as the D.C. Circuit has put it, "granting [a] § 3553(e) motion free[s] the district court to . . . disregard the mandatory minimum." *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013).

Legislative history describing Section 3553(e) likewise explains that "a substantial assistance motion granted by the court removes the mandatory minimum requirements that would otherwise be binding at sentencing." U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 59 (1991), *referenced in* H.R Rep. No. 103-460, at 4. A defendant in this situation is "not subject to any mandatory minimum penalties." *Id.*; *see also* Message from the President of the United States Transmitting the Drug Free America Act of 1986, H.R. Doc. 99-266, at 117 (Section 3553(e) creates "an

exception" from otherwise applicable "mandatory minimum sentences."); 139 Cong. Rec. 27,842 (1993) (statement of Sen. Hatch) ("When the court grants a substantial-assistance motion, mandatory minimum sentences do not apply.").[9]

The Guidelines themselves also recognize that a substantial assistance motion "waive[s]" an otherwise applicable mandatory minimum. U.S.S.G. § 2D1.1 cmt. n.24; *see also* U.S.S.G. app. C, amend. 570, reason for amend. (Supp. 2016) (A defendant "who is the beneficiary of a Government substantial assistance motion under 18 U.S.C. § 3553(e)[] is not subject to any statutory minimum term of supervised release."). And last, but not least, the Government explained below that when a district court grants a substantial assistance motion, its order "eliminate[s] the requirement that the court apply the mandatory minimum." U.S. C.A. Koons Br. 15.

Once an otherwise binding mandatory minimum does not apply, something must provide the framework for sentencing. That something is the Guidelines. Put another way, Section 3553(e) is "designed to deal with statutory minima that lie above the range of sentences the Sentencing Commission thinks best. In exchange for assistance, the prosecutor can remove the barrier to the use of

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[9] The form the Judicial Conference has created, and the Sentencing Commission has approved, for federal courts to provide a written "Statement of Reasons" whenever they impose a criminal sentence is in accord. That form provides a box for judges to check when an otherwise applicable mandatory minimum "does not apply" because of the defendant's substantial assistance. *See* AO 245 SOR, Part II.

the guideline range." *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994) (Easterbrook, J., dissenting).[10] Thus, even if the district court here was required to reference (and to depart from) the statutory minimums that were waived by means of petitioners' substantial assistance, the Guidelines provided the methodology for the downward departure. And that means petitioners' sentences were "based on" the guidelines recommendations.

The Government, in fact, recognized the primacy of the Guidelines in this situation before the present controversy even arose. Under *Alleyne v. United States*, 570 U.S. 99 (2013), any fact that triggers a statutory mandatory minimum is an "element" under the Sixth Amendment that must be included in an indictment and proven beyond a reasonable doubt to a jury. *Id.* at 103. This rule, however, does not apply to facts that merely affect advisory guidelines ranges. *See United States v. Booker*, 543 U.S. 220, 233 (2005). The issue arises, therefore, whether *Alleyne* applies in the circumstances under which petitioners were sentenced—that is, where a defendant's criminal conduct subjects him to a statutory mandatory minimum but a substantial assistance motion empowers the district court to disregard it.

As the Government has explained, the answer is no: "[T]he key feature" in such a scenario is that the defendant "ultimately [i]s not subject to any statutory minimum sentence, because the district court granted a substantial assistance motion in his case." Br. for Appellee at 11, *United States v. Becton*, 593

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[10] This Court vindicated Judge Easterbrook's dissent in *Melendez v. United States*, 518 U.S. 120 (1996).

Fed. Appx. 469 (6th Cir. 2014) (No. 12-5851), 2014 WL 3556222. "No fact operate[s] to increase [the defendant's] statutory penalties, because he [i]s not subject to any minimum penalty once the substantial assistance motion [i]s granted." *Id.* at 11-12. The Sixth Circuit has deemed this explanation so obviously correct that it has adopted it in an unpublished opinion, *see Becton*, 593 Fed. Appx. 469, and petitioners are aware of no court that has held to the contrary.

2. Section 994(n) confirms the Sentencing Commission's power to promulgate guidelines that recommend sentences below otherwise applicable mandatory minimums when district courts grant substantial assistance motions. In that provision, Congress directed the Commission to "assure that the guidelines reflect the general appropriateness of imposing a *lower* sentence than . . . that established by statute as a minimum sentence, to take into account a defendant's substantial assistance." 28 U.S.C. § 994(n) (emphasis added).

This statute reinforces that when district courts grant substantial assistance motions, the Sentencing Reform Act leaves to the Guidelines how to calculate recommended below-minimum sentences. Thus, even assuming, at the time of petitioners' sentencings, the Guidelines required the sentences of cooperators in their situation to be tethered to the mandatory minimums that would have applied absent their substantial assistance, that was a choice the Commission made, not a matter of statutory compulsion. The Sentencing Commission could just as legitimately have pegged petitioners' sentences to 90% of the otherwise applicable statutory minimums or one year less than the statutory minimums—or, as

it has now done expressly under U.S.S.G. § 1B1.10(c), to the sentencing ranges that apply based solely on offense level and criminal history.

3. Perhaps recognizing the Eighth Circuit's error in overlooking Sections 3553(e) and 994(n), the Solicitor General tried in its brief in opposition to shore up the holding below. There, the Solicitor General maintained that Section 3553(e) does not confer as much authority upon the Commission as petitioners claim. According to the Solicitor General, Section 3553(e) "expressly ties" sentences in the situation here to "the sentence 'established by statute as a minimum sentence'" and dictates that departures from those minimums "must be based *exclusively* on assistance-related considerations, not on any other considerations embodied in the Guidelines." BIO 15 (quotation marks and citation omitted).

The Solicitor General's construction of Section 3553(e) turns the provision on its head. The whole point of Section 3553(e) is to allow district courts to "escape" the application of mandatory minimums, *Dorsey*, 567 U.S. at 285, not to chain courts to such statutory sentences. *See supra* at 28-29. Section 3553(e), therefore, expressly authorizes courts "to impose a sentence *below* a level established by statute as a minimum sentence." 18 U.S.C. § 3553(e) (emphasis added).

It makes no difference that Section 3553(e) also says that a sentence below an otherwise applicable mandatory minimum should "reflect a defendant's substantial assistance." 18 U.S.C. § 3553(e). Contrary to the Solicitor General's contention, the word "reflect" does not indicate that a sentence in this situation must be *based on* the inapplicable statutory

minimum—much less that the sentence must be "exclusively" based on factors directly related to substantial assistance without regard to "any other considerations embodied in the Guidelines," BIO 15. The word "reflect" means simply "to make apparent." The Merriam-Webster Dictionary 607 (2004); *see also* American Heritage Dictionary 1467 (4th ed. 2000). Accordingly, a sentence "reflects" a defendant's substantial assistance simply by being lower than it otherwise would be—that is, by making apparent that the defendant's actions have rendered the mandatory minimum inapplicable. There is no reason why such a sentence cannot take into account the seriousness of the defendant's conduct, as quantified in the Guidelines.[11]

Even the decision the Government cites for its preferred construction of Section 3553(e) recognizes that the word "reflect" does not eclipse the relevance of guidelines ranges in substantial assistance cases. That case holds that a district court in the situation here should identify "the outer limit of [a] permissible departure" downward from the statutory minimum according to "the nature and extent of the assistance rendered." *United States v. Winebarger*, 664 F.3d 388, 395 (3d Cir. 2011). But after that, the court may consider "the nature and circumstances of the offense" in determining the precise length of sentence to impose between the outer (downward) limit and

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[11] Similarly, if a university reduces its tuition price so as to "reflect" a low-income student's limited resources, it need not key the amount of the reduction directly to the degree to which the student is unable to pay the sticker price. It can simply charge the student less money, however exactly the lower price tag might be calculated.

the statutory minimum. *Id.* And the way under the Guidelines to assess the seriousness of the offense is to consult the range resulting from the defendant's offense level and criminal history, as well as any other guidelines sentencing requirements related to the defendant's conduct. *See* 28 U.S.C. § 994(a)-(c). Therefore, even if Section 3553(e) is as restrictive as *Winebarger* says, sentences imposed after granting a motion pursuant to that statute are still necessarily "based on" the Guidelines.

At any rate, the Government's proposed construction of Section 3553(e) still does not account for Section 994(n). That provision directs the Sentencing Commission in appropriate circumstances to recommend imposing "a sentence that is lower than that established by statute as a minimum sentence." 28 U.S.C. § 994(n). And nothing in that statute requires the Commission in the circumstances here to tether such sentences to the very mandatory minimum that a defendant's substantial assistance renders inapplicable. Consequently, even if the Eighth Circuit is right that, when petitioners were originally sentenced, U.S.S.G. § 5G1.1(b) required anchoring their downward departures to their inapplicable mandatory minimums, the calculations influenced by Guideline 5G1.1(b) were a foundation for petitioners' sentences. And that foundation has now been retroactively altered, resulting in lower sentencing ranges for petitioners.

II. The structure and objectives of the Sentencing Reform Act support enabling petitioners to seek sentence reductions.

Two aspects of the Sentencing Reform Act reinforce the conclusion that the Sentencing Commission has the power to make defendants in petitioners' situation eligible for sentence reductions: (A) the Act's conferral of broad authority upon the Commission to determine who may benefit from retroactive amendments to the Guidelines; and (B) the Act's directive to avoid unwarranted sentencing disparities.

A. The Sentencing Commission has broad authority to determine who may benefit from retroactive amendments to the Guidelines.

Section 3582(c)(2) "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon v. United States*, 560 U.S. 817, 828 (2010). And the Sentencing Reform Act, by its terms, gives a "substantial role" to the Sentencing Commission "with respect to sentence-modification proceedings." *Id.* at 826.

For one thing, Section 3582(c)(2) allows sentence reductions only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). To that end, the Sentencing Reform Act empowers the Commission to issue "general policy statements regarding . . . *the appropriate use of* . . . the sentence modification provision[] set forth in" Section 3582(c). 28 U.S.C. § 994(a)(2)(B) (emphasis added). As this Court recently explained, the statutory term "appropriate" provides "agencies with flexibility" to determine how

to implement congressional grants of authority. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015).

Equally important, the Act provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify *in what circumstances* and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u) (emphasis added). This is an "unusual[ly] explicit" grant of power. *Braxton v. United States*, 500 U.S. 344, 348 (1991). It is also unqualified. Courts therefore are bound to follow the Commission's specifications in determining whether a sentence reduction is permissible. *See Dillon*, 560 U.S. at 827; *see also Braxton*, 500 U.S. at 348.

The Sentencing Commission here exercised the precise discretionary authority and expertise that the Sentencing Reform Act envisions. The Commission first determined that the offense levels set in Chapter 2 of the Guidelines were too high and thus reduced them by two levels across the board. *See* U.S.S.G. app. C, amend. 782, reason for amend. (Supp. 2016). The Commission next concluded that this change should be retroactive. *See* U.S.S.G. § 1B1.10(d). It also determined that it would be "appropriate," 28 U.S.C. § 994(a)(2)(C), for prisoners "in [these] circumstances," *id.* § 994(u), to be able to seek sentence reductions. Specifically, the Commission expressly resolved that where, as here, "the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of [the policy statement allowing sentence

reductions when the Commission has lowered the applicable guideline range] the amended guideline range shall be determined without regard to the operation of § 5G1.1." U.S.S.G. § 1B1.10(c); *see also id.* § 1B1.10(d) (applying this methodology to defendants under Amendment 782).

The Sentencing Commission reached this conclusion about eligibility for Section 3582(c) relief after collecting written testimony, holding public hearings, and undertaking careful reflection. In a simultaneously enacted amendment that implements Amendment 782 and other retroactive amendments, the Commission explained that defendants in petitioners' situation should have "the opportunity to receive the full benefit of a reduction that accounts for [their substantial] assistance" to the authorities. U.S.S.G. app. C, amend. 780, reason for amend. (Supp. 2016). The Commission explained:

> The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.

Id.

All of this reasoning puts the lie to the Eighth Circuit's assertion (J.A. 53) that the Sentencing Commission "ignored th[e] 'based on' statutory requirement" in Section 3582(c)(2). The Commission expressly observed that defendants who gave substantial assistance were eligible for sentences "below" otherwise applicable "statutory minimum[s]." U.S.S.G. app. C, amend. 780, reason for amend. (Supp. 2016). Consequently, they may seek relief as a result of retroactive amendments to guidelines reducing their offense levels, even though defendants "who are otherwise similar (but did not provide substantial assistance)" remain "subject to a . . . statutory minimum." *Id.*

This Court should respect the Commission's determination in this regard. The Commission's "informed assessment[s]"—much like those of the Advisory Committee on the Federal Rules of Civil Procedure when it comes to matters Congress has delegated to it to address—are the "'preferred means'" of determining when prisoners should be eligible for sentence reductions, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017) (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 113 (2009)). *See Braxton*, 500 U.S. at 348. That being so, the Commission's assessment that cooperators such as petitioners should be eligible under Section 3582(c)(2) for sentence reductions "warrants the Judiciary's full respect." *Baker*, 137 S. Ct. at 1714 (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995)).

B. Allowing petitioners to seek sentence reductions is necessary to avoid unjustifiable sentencing disparities.

1. An overarching goal of the Sentencing Reform Act—and a specific directive to the Sentencing

Commission—is to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *accord* 28 U.S.C. § 991(b)(1)(B). This Court, therefore, has warned against construing the Act to "create new anomalies—new sets of disproportionate sentences—not previously present." *Dorsey v. United States*, 567 U.S. 260, 278 (2012).

In *Dorsey*, for example, the Court held that it was necessary to give defendants the benefit of statutory amendments and new guidelines exempting them from previously applicable mandatory minimums because otherwise the amendments would have created "a new disparate sentencing 'cliff.'" 567 U.S. at 279. The difference of a single gram of drugs in two otherwise identical cases would have triggered several years' difference in sentences. *Id.*; *see also Kimbrough v. United States*, 552 U.S. 85, 108 (2007) ("Under [18 U.S.C. § 3553(a)(6)], district courts must take account of . . . the 'cliffs' resulting from the statutory mandatory minimum sentences.").

The Eighth Circuit's decision creates the same prospect for "new anomalies—new sets of disproportionate sentences—not previously present." *Dorsey*, 567 U.S. at 278. As the district court noted, and the Government confirmed in its brief in opposition, Section 3582(c)(2) indisputably allows courts to reduce defendants' sentences pursuant to Amendment 782 "when a defendant's guidelines range [was] *above* the mandatory minimum." BIO 15 n.3; *see also* J.A. 61. Thus, where defendants' "extensive criminal histories or severe offense conduct" caused their guidelines ranges for drug offenses to exceed otherwise applicable mandatory minimums, all agree that Section 3582(c)(2) now

allows them to seek sentence reductions. *United States v. Williams*, 808 F.3d 253, 262 (4th Cir. 2015). Yet under the Eighth Circuit's construction of Section 3582(c)(2), similarly situated defendants convicted of drug crimes and "whose Guidelines ranges are entirely *below* their statutory minimums[] would be denied relief." *Id.* (emphasis added).

This makes no sense. Consider, for example, two defendants who were convicted—as petitioner Gardea was—of drug crimes subjecting them to a 120-month mandatory minimum sentence. Suppose that both received lower sentences under Section 3553(e) in exchange for giving substantial assistance. If defendant A's original U.S.S.G. § 2D1.1 guidelines range was 121 to 151 months, all agree he is eligible for a sentence reduction under Section 3582(c)(2) and Amendment 782. But if defendant B's original U.S.S.G. § 2D1.1 guidelines range was 108 to 135 months—a range that substantially overlaps with defendant A's but dips just below the inapplicable mandatory minimum—the Eighth Circuit's construction of Section 3582(c)(2) would render him ineligible for a sentence reduction. This would create just the sort of "new disparate sentencing 'cliff'" that this Court condemned in *Dorsey*. *See* 567 U.S. at 279.

Worse yet, the Eighth Circuit's rule would often result in many defendants whose crimes were *more serious* than otherwise identically situated counterparts receiving *shorter* sentences. A comparison between a case the Government approvingly cites (*United States v. Freeman*, 586 Fed. Appx. 237 (7th Cir. 2014), *cited in* BIO 15 n.3) and petitioner Koons' case illustrates the point.

Freeman, who had a criminal history category of IV, was convicted of a federal drug offense carrying a

240-month mandatory minimum sentence. Pursuant to his offense level, Freeman's guidelines range was 292 to 365 months' imprisonment. But because he provided substantial assistance, the district court originally departed from that range all the way down to 180 months in prison. *See Freeman*, 586 Fed. Appx. at 237, 239.

Koons, like Freeman, had a criminal history category of IV. Like Freeman, he was convicted of a federal drug offense carrying a 240-month mandatory minimum sentence. And as in Freeman's case, the district court gave Koons a 180-month sentence to account for his substantial assistance.

The only difference between Freeman and Koons is that Koons' guidelines range based solely on his criminal history and offense level (151 to 188 months) was entirely *below* the otherwise applicable mandatory minimum. Thus, whereas the district court in Freeman's case anchored Freeman's sentence to a guidelines range of 292 to 365 months, the district court in Koons' case applied U.S.S.G. § 5G1.1(b) to render the inapplicable mandatory minimum (240 months) the anchor for Koons' downward departure.

Under the Eighth Circuit's construction of Section 3582(c)(2), Freeman is eligible for a sentence reduction, because his initial guidelines range exceeded the inapplicable statutory minimum, but Koons is not. The two are identically situated except for the fact that the Guidelines assigned Freeman's drug crime a higher offense level. Yet because Freeman committed a *more serious* transgression, which carried a higher offense level, he is eligible to benefit from the Sentencing Commission's two-level reduction of offense levels corresponding to drug

quantities. That is, Freeman is eligible to have his 180-month sentence reduced further below the inapplicable statutory minimum. Koons, by contrast, must serve his entire 180 months, even though the mandatory minimum was equally inapplicable in his case—and his crime was not as serious.

This is an outcome that might have made Kafka smirk. But it would subvert the priorities of the Sentencing Reform Act—and, indeed, any rational system of sentencing. *See, e.g.*, *United States v. Wren*, 706 F.3d 861, 864 (7th Cir. 2013) (noting this irrationality and urging the Sentencing Commission to address it, which it did in Amendment 780). If anything, a defendant who is similarly situated to another in all ways except having committed less serious conduct should be eligible to receive a shorter sentence. He certainly should not be forced to serve a longer one. And nothing in Section 3582(c)(2) resigns him to that illogical fate.

2. At the very least, the rule of lenity should preclude the Eighth Circuit's construction of Section 3582(c)(2). That time-honored rule—"perhaps not much less old than [statutory] construction itself," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)—provides that "if Congress does not fix the punishment for a federal crime clearly and without ambiguity, doubt will be resolved against [the government]." *Bell v. United States*, 349 U.S. 81, 84 (1955); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994) (government's proffered interpretation of sentencing statute must be "unambiguously correct"); *Bifulco v. United States*, 447 U.S. 381, 400 & n.17 (1980) (same); *Busic v. United States*, 446 U.S. 398, 406-07 (1980) (same); *Simpson v. United States*, 435 U.S. 6, 15-16 (1978)

(same). Section 3582(c)(2) does not clearly and unambiguously forbid sentencing reductions in this context.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioners pleaded guilty to drug offenses that carried statutory minimum sentences higher than advisory ranges calculated by reference to Sentencing Guidelines § 2D1.1. The district court granted each petitioner a departure below the statutory minimum "to reflect [his] substantial assistance" to law enforcement. 18 U.S.C. 3553(e). The recommended ranges under Sentencing Guidelines § 2D1.1 were later decreased retroactively, but the statutory minimums were not.

The question presented is whether petitioners were "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," so as to be eligible for postjudgment sentence reductions under 18 U.S.C. 3582(c)(2).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and Sentencing Guidelines provisions involved 1
Statement 2
A. Initial proceedings 2
B. Sentence reduction proceedings 11
Summary of argument 16
Argument 18
The statutory minimum sentences for petitioners' offenses preclude them from seeking sentence reductions under 18 U.S.C. 3582(c)(2) 18
A. The "sentencing ranges" for petitioners' offenses were statutory minimums that the Commission cannot "lower" 19
B. The substantial-assistance departures that petitioners received under 18 U.S.C. 3553(e) were not "based on" the later-amended drug guidelines 28
1. A departure under Section 3553(e) is anchored to the statutory minimum 29
2. The proper extent of a Section 3553(e) departure depends solely on the appropriate reward for the defendant's substantial assistance 32
3. The sentencing proceedings in petitioners' cases illustrate the proper procedure for a substantial-assistance departure under Section 3553(e) 40
4. A below-statutory-minimum guidelines calculation is not a "sentencing range" on which a Section 3553(e) departure is "based" ... 43
C. The Commission's policy statement implementing Section 3582(c)(2) cannot allow petitioners to satisfy the requirements of the statute 48

Table of Contents—Continued: Page

D. Sentence reductions for petitioners would subvert the function of Section 3582(c)(2) by increasing sentencing disparities 54
Conclusion 59
Appendix — Statutory and Sentencing Guidelines provisions 1a

TABLE OF AUTHORITIES

Cases:

Biddle v. *Perovich*, 274 U.S. 480 (1927) 58
Braxton v. *United States*, 500 U.S. 344 (1991) 50
Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012) 38
Dillon v. *United States*, 560 U.S. 817 (2010) ..... *passim*
Dorsey v. *United States*, 567 U.S. 260 (2012) 5, 24, 28, 55
Florida Dep't of Revenue v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008) 30, 33
Freeman v. *United States*, 564 U.S. 522 (2011) ..... *passim*
Gall v. *United States*, 552 U.S. 38 (2007) 20
Henson v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) 21
IBP, Inc. v. *Alvarez*, 546 U.S. 21 (2005) 21
Loughrin v. *United States*, 134 S. Ct. 2384 (2014) 31, 36
Melendez v. *United States*, 518 U.S. 120 (1996) ..... *passim*
Mi[illegible]etta v. *United States*, 488 U.S. 361 (1989) 19
Neal v. *United States*, 516 U.S. 284 (1996) 23, 28, 52, 53
OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2015) 44
Pepper v. *United States*, 562 U.S. 476 (2011) 20, 39
Peugh v. *United States*, 569 U.S. 530 (2013) 26, 47

Cases—Continued: Page

Russello v. *United States*, 464 U.S. 16 (1983) 31, 36
Samantar v. *Yousuf*, 560 U.S. 305 (2010) 38
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 44
Schick v. *Reed*, 419 U.S. 256 (1974) 58
Sealed Case, In re, 722 F.3d 361 (D.C. Cir. 2013) 41, 43
State Farm Fire & Cas. Co. v. *United States ex rel. Rigsby*, 137 S. Ct. 436 (2016) 36
Stinson v. *United States*, 508 U.S. 36 (1993) 27, 38
Taniguchi v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012) 21
United States v. *A.B.*, 529 F.3d 1275 (10th Cir.), cert. denied, 555 U.S. 962 (2008) 29, 39, 40
United States v. *Ahlers*, 305 F.3d 54 (1st Cir. 2002) 30, 31, 32
United States v. *Billue*, 576 F.3d 898 (8th Cir.), cert. denied, 558 U.S. 1058 (2009) 8, 13
United States v. *Booker*, 543 U.S. 220 (2005) 20
United States v. *C.D.*, 848 F.3d 1286 (10th Cir. 2017), petition for cert. pending, No. 16-9672 (filed June 20, 2017) 16
United States v. *Carter*, 595 F.3d 575 (5th Cir. 2010) 29
United States v. *Casiano*, 113 F.3d 420 (3d Cir.), cert. denied, 522 U.S. 887 (1997) 37
United States v. *Dyke*, 718 F.3d 1282 (10th Cir. 2013) 37
United States v. *Fausto*, 484 U.S. 439 (1988) 31, 32
United States v. *Fulton*, 431 Fed. Appx. 732 (10th Cir. 2011) 39
United States v. *Grant*, 636 F.3d 803 (6th Cir.), cert. denied, 565 U.S. 931 (2011) 34
United States v. *Hood*, 556 F.3d 226 (4th Cir.), cert. denied, 558 U.S. 921 (2009) 29

Cases—Continued: Page

United States v. *Jackson*, 577 F.3d 1032 (9th Cir. 2009) 29, 39
United States v. *Joiner*, 727 F.3d 601 (6th Cir. 2013), cert. denied, 134 S. Ct. 1357 (2014) 29
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 58
United States v. *LaBonte*, 520 U.S. 751 (1997) 50
United States v. *Mills*, 613 F.3d 1070 (11th Cir. 2010) 29
United States v. *Pepper*, 412 F.3d 995 (8th Cir. 2005) 37
United States v. *Poland*, 562 F.3d 35 (1st Cir. 2009) 34
United States v. *Poole*, 550 F.3d 676 (7th Cir. 2008) 29
United States v. *Richardson*, 521 F.3d 149 (2d Cir. 2008) 42
United States v. *Roa-Medina*, 607 F.3d 255 (1st Cir. 2010) 29, 40
United States v. *Rodriguez-Soriano*, 855 F.3d 1040 (9th Cir. 2017), petition for cert. pending, No. 17-6292 (filed Oct. 6, 2017) 47
United States v. *Rublee*, 655 F.3d 835 (8th Cir. 2011), cert. denied, 565 U.S. 1240 (2012) 39
United States v. *Savani*, 733 F.3d 56 (3d Cir. 2013) 41, 43
United States v. *Spinks*, 770 F.3d 285 (4th Cir. 2014) 8, 17, 32
United States v. *Tadio*, 663 F.3d 1042 (9th Cir. 2011), cert. denied, 566 U.S. 1029 (2012) 34
United States v. *Williams*, 474 F.3d 1130 (8th Cir. 2007) 16, 30, 32
United States v. *Williams*, 551 F.3d 182 (2d Cir. 2009) 39
United States v. *Winebarger*, 664 F.3d 388 (3d Cir. 2011), cert. denied, 134 S. Ct. 181 (2013) 32, 33, 37, 38, 39, 43
Wells, Ex parte, 59 U.S. (18 How.) 307 (1856) 58

Statutes, guidelines, and rules: Page

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, 100 Stat. 3207:
§ 1007(a), 100 Stat. 3207-7 33
§ 1009(a), 100 Stat. 3207-8 33
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(2) 44
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1837 (18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991 *et seq.*):
§ 212(a), 98 Stat. 1987-1992 19
§ 215(b), 98 Stat. 2015-2017 ..... 34, 35
§ 217(a), 98 Stat. 2017-2026 19
§ 235, 98 Stat. 2031-2033 ..... 34, 35
Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 34
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1985 31
18 U.S.C. 922(g)(1) 4
18 U.S.C. 3552(a) 5
18 U.S.C. 3553(a) 5, 20, 39, 1a
18 U.S.C. 3553(a)(2) 40
18 U.S.C. 3553(a)(4) 17, 20, 22, 23, 26, 1a
18 U.S.C. 3553(a)(4)(A) 20, 21, 26, 1a
18 U.S.C. 3553(a)(5) 20, 26, 2a
18 U.S.C. 3553(a)(5)(A) 20, 2a
18 U.S.C. 3553(e) ..... *passim*, 3a
18 U.S.C. 3553(f) 17, 31, 36, 3a
18 U.S.C. 3582(c) 19, 6a
18 U.S.C. 3582(c)(2) ..... *passim*

Statutes, guidelines, and rules—Continued: Page

21 U.S.C. 841(a)(1) 2, 4, 5, 37, 8a
21 U.S.C. 841(b)(1) ..... *passim*, 8a
21 U.S.C. 841(b)(1)(A) 4, 5, 22, 8a
21 U.S.C. 841(b)(1)(B) 5, 22, 9a
21 U.S.C. 846 ..... 2, 4, 5, 11a
28 U.S.C. 994 ..... 25, 35, 36
28 U.S.C. 994(a) 20
28 U.S.C. 994(b)(1) 21, 22, 23
28 U.S.C. 994(n) 25, 35, 37, 49, 53, 14a
28 U.S.C. 994(*o*) 11, 20, 14a
28 U.S.C. 994(u) 11, 20, 49, 50, 15a
United States Sentencing Guidelines:
§ 1B1.1(a) 17, 22, 26, 28, 47, 16a
§ 1B1.1(a)(1) 22, 16a
§ 1B1.1(a)(5) 22, 16a
§ 1B1.1(a)(6) 23, 16a
§ 1B1.1(a)(7) 5, 23, 54, 55, 17a
§ 1B1.1(a)(8) 23, 17a
§ 1B1.1(b) 26, 17a
§ 1B1.7 27
§ 1B1.10 ..... 12, 18, 49, 50, 51, 52, 17a
§ 1B1.10(a) 50, 17a
§ 1B1.10(b)(1) 50, 18a
§ 1B1.10(b)(2)(A) 51, 19a
§ 1B1.10(b)(2)(B) 51, 19a
§ 1B1.10(c) 12, 51, 52, 53, 20a
§ 1B1.10, comment. (n.1(A)) 51
§ 1B1.10, comment. (n.4) 57
§ 2D1.1 ..... 5, 11, 23

Guidelines and rules—Continued: Page

§ 3E1.1 ..... 5, 39
§ 5G1.1 ..... 23, 21a
§ 5G1.1(b) ..... *passim*, 21a
§ 5K1.1 ..... *passim*, 21a
§ 5K1.1(a) 8, 25, 26, 37, 38, 22a
§ 5K1.1, comment. (n.1) 8, 25, 27, 37, 39
§ 5K1.1, comment. (n.2) 39
§ 5K1.1, comment. (background) 28, 39
App. C Supp:
Amend. 780 (Nov. 1, 2014) 51, 52
Amend. 782 (Nov. 1, 2014) ..... *passim*
Amend. 788 (Nov. 1, 2014) 11
Fed. R. Crim. P.:
Rule 11(c)(1)(C) 44, 45
Rule 35 34
Rule 35(b) (1985) 33
Rule 35(b) (1987) 34
Rule 35(b) 33, 34, 39
Rule 35 advisory committee's note (2002) 34

Miscellaneous:

H.R. Rep. No. 460, 103d Cong., 2d Sess. (1994) 36
Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legis., U.S. Dep't of Justice, to Hon. Patti B. Saris, U.S. Sentencing Comm'n 4 (Mar. 6, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf 42

Miscellaneous—Continued: Page

Alina Ptaszynski, *One Percent Listing Fee Arrives in 18 Additional Markets* (Oct. 2, 2017), https://www.redfin.com/blog/2017/10/ 1-percent-listing-announcement.html. 48

The Drug Free America Act of 1986: Message from The President of the United States, H.R. Doc. No. 266, 99th Cong., 2d Sess. (1986) 35, 37

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In the Supreme Court of the United States

No. 17-5716

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v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 44-56) is reported at 850 F.3d 973. The opinion of the district court (J.A. 57-95) is reported at 146 F. Supp. 3d 1022.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017. A petition for rehearing was denied on May 25, 2017 (J.A. 98-100). The petition for a writ of certiorari was filed on August 22, 2017, and granted on December 8, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Pertinent statutes and United States Sentencing Guidelines provisions are reprinted in an appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

Following guilty pleas in the United States District Court for the Northern District of Iowa, petitioners were convicted in separate criminal cases of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and other offenses. The district court sentenced petitioner Koons to 180 months of imprisonment, petitioner Putensen to 264 months of imprisonment, petitioner Feauto to 132 months of imprisonment, petitioner Gutierrez to 192 months of imprisonment, and petitioner Gardea to 84 months of imprisonment. J.A. 116, 154, 177, 198, 216-219. The sentences included subsequent terms of ten years of supervised release for petitioners Koons, Putensen, Feauto, and Gutierrez, and eight years of supervised release for petitioner Gardea. J.A. 118, 154, 178, 199, 218. The district court later determined that postjudgment amendments to the advisory Sentencing Guidelines did not render petitioners eligible for sentence reductions under 18 U.S.C. 3582(c)(2). J.A. 57-97. The court of appeals affirmed. J.A. 52-56.

A. Initial Proceedings

Although petitioners' individual circumstances differ, their initial proceedings unfolded in substantially similar ways. In each case, the parties entered into a plea agreement that evidenced an understanding that a statutory minimum penalty would apply. In each case, the Probation Office informed the district court that the statutory minimum penalty was also the appropriate sentence under the Sentencing Guidelines, because the Guidelines would otherwise have recommended a sentence below that statutory minimum. In each case, the government moved for a departure below the statutory minimum to reflect petitioners' substantial assistance

to law enforcement. And in each case, the court imposed a sentence that it calculated as a departure from the sentence that it would otherwise have imposed—namely, the statutory minimum or an upward variance therefrom. In no case did the court reference any guidelines range below the statutory minimum in determining the extent of that departure.

Table 1: Summary of Petitioners' Sentences

	Initial Guidelines Calculation	**Statutory Minimum**	**Substantial Assistance Departure**	**Sentence**
Koons	151-188 months	240 months	25%	180 months (240 - 25%)
Putensen	188-235 months	Life in Prison (406 months)	35%	264 months (406 - 35%)
Feauto	168-210 months	240 months	45%	132 months (240 - 45%)
Gutierrez	188-235 months	240 months (before 60-month upward variance)	108 months	192 months (240 + 60 - 108)
Gardea	70-87 months	120 months	30%	84 months (120 - 30%)

1. At various points between 2008 and 2014, petitioners each pleaded guilty to one or more drug-trafficking offenses that carried a statutory minimum sentence under 21 U.S.C. 841(b)(1). Section 841(b)(1) creates a tiered scheme of minimum sentences, the lengths of which are dictated by, *inter alia*, the type and quantity

of drugs involved in the offense and the criminal history of the offender. See *ibid.*; see also 21 U.S.C. 846 (conspiracy to traffic drugs "subject to the same penalties" as substantive drug trafficking). Each petitioner expressly acknowledged in his plea agreement that his offense was "punishable by a mandatory minimum sentence." Supp. J.A. 2, 22, 66, 92, 118.

Petitioner Koons pleaded guilty to conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1). Supp. J.A. 8, 10. He acknowledged that he had a prior felony drug conviction and that his offense carried a statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 2.

Petitioner Putensen pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of methamphetamine, to distribute and possess pseudoephedrine, and to possess pseudoephedrine with the intent to manufacture methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Supp. J.A. 28-29. He acknowledged that he had two prior felony drug convictions and that his offense carried a statutory minimum sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 21-22.

Petitioner Feauto pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and to unlawful possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). Supp. J.A. 102-104. He acknowledged that he had a prior felony drug conviction and that his drug offense

carried a statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 92.

Petitioner Gutierrez pleaded guilty to conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Supp. J.A. 71-72. He acknowledged that he had a prior felony drug conviction and that his offense carried a statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 66.

Petitioner Gardea pleaded guilty to conspiracy to distribute five grams or more of actual methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Supp. J.A. 123-124. He acknowledged that he had a prior felony drug conviction and that his offense carried a statutory minimum sentence of ten years of imprisonment under 21 U.S.C. 841(b)(1)(B). Supp. J.A. 118.

2. After each petitioner's guilty plea, the Probation Office prepared a presentence investigation report that applied the advisory Sentencing Guidelines (which, except where noted, were identical at all relevant times). See 18 U.S.C. 3552(a). Each report stated that the appropriate sentence under the Guidelines was the statutory minimum for the relevant drug offense.

For each petitioner, the Probation Office calculated an initial range of sentences without reference to the statutory minimum, by determining the base offense level under the default guidelines for drug offenses, Sentencing Guidelines § 2D1.1; applying various adjustments (*e.g.*, a downward adjustment for acceptance of responsibility, *id.* § 3E1.1); and cross-referencing the resulting offense level with each petitioner's criminal history, *id.* § 1B1.1(a)(7). See *Dorsey* v. *United States*, 567 U.S. 260, 266-267 (2012) (explaining guidelines calculation in typical drug case). But each time, the result

of that initial calculation was below the statutory minimum dictated by 21 U.S.C. 841(b)(1). The Probation Office therefore determined the ultimate recommended guidelines sentence in each case by applying Sentencing Guidelines § 5G1.1(b), which provides that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."

For petitioner Koons, the Probation Office computed a base offense level of 34 under the default drug guidelines, decreased that by three levels for acceptance of responsibility, and combined his offense level with his criminal history category of IV for an initial range of 151 to 188 months of imprisonment. Supp. J.A. 15-17. Because that range fell entirely below the statutory minimum sentence of 20 years of imprisonment, the Probation Office reported a "guideline range" of 240 months. *Id.* at 16-17.

For petitioner Putensen, the Probation Office computed a base offense level of 34 under the default drug guidelines, applied offsetting adjustments (for his managerial role and acceptance of responsibility) with no net effect on the offense level, and combined his offense level with his criminal history category of III for an initial range of 188 to 235 months of imprisonment. Supp. J.A. 39-41. Because that range fell entirely below the statutory minimum sentence of life imprisonment, the Probation Office reported a "guideline range" of life imprisonment. *Id.* at 41.

For petitioner Feauto, the Probation Office computed a base offense level of 32 under the default drug guidelines, applied a net increase of one level (for his use of a firearm, obstruction of justice, and acceptance

of responsibility), and combined his offense level with his criminal history category of III for an initial range of 168 to 210 months of imprisonment. Supp. J.A. 111-113. Because that range fell entirely below the statutory minimum sentence of 20 years of imprisonment, the Probation Office reported a "guideline term" of 240 months. *Id.* at 113.

For petitioner Gutierrez, the Probation Office computed a base offense level of 32 under the default drug guidelines, applied a net decrease of one level (for his use of a firearm and acceptance of responsibility), and combined his offense level with his criminal history category of VI for an initial range of 188 to 235 months of imprisonment. Supp. J.A. 74-76. Because that range fell entirely below the statutory minimum sentence of 20 years of imprisonment, the Probation Office reported a "guideline term" of 240 months. *Id.* at 76.

For petitioner Gardea, the Probation Office computed a base offense level of 26 under the default drug guidelines, decreased that by three levels for acceptance of responsibility, and combined his offense level with his criminal history category of IV for an initial range of 70 to 87 months of imprisonment. Supp. J.A. 126-128. Because that range fell entirely below the statutory minimum sentence of ten years of imprisonment, the Probation Office reported a "guideline term" of 120 months. *Id.* at 128.

3. At each petitioner's sentencing hearing, the government moved for a departure from the statutory minimum sentence under 18 U.S.C. 3553(e). A Section 3553(e) motion allows a court to "impose a sentence below" a statutory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

Ibid. Section 3553(e) further provides that "[s]uch sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." *Ibid.*

The government also moved for departures from petitioners' guideline sentences under Sentencing Guidelines § 5K1.1, which similarly provides that a court "may depart from the guidelines" upon "motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 5K1.1 specifies a set of nonexclusive factors that the district court should consider in determining the extent of any substantial-assistance departure under either Section 3553(e) or Section 5K1.1, such as the "significance and usefulness of the defendant's assistance," "any danger or risk of injury to the defendant or his family resulting from his assistance," and the "timeliness of the defendant's assistance." *Id.* § 5K1.1(a); see *id.* § 5K1.1, comment. (n.1); *Melendez* v. *United States*, 518 U.S. 120, 129-130 & n.10 (1996).

For each petitioner, the district court granted a substantial-assistance departure, which it calculated as a reduction from the statutory minimum (or, in petitioner Gutierrez's case, a reduction from a variance upward from the statutory minimum). As the court explained—and as precedent of the Eighth Circuit and every other court of appeals to address the issue required—the district court based its substantial-assistance reduction on considerations related to petitioners' substantial assistance, such as those outlined in Sentencing Guidelines § 5K1.1, not on other factors. See *United States* v. *Billue*, 576 F.3d 898, 902-905 (8th Cir.), cert. denied, 558 U.S. 1058 (2009); see also *United States* v. *Spinks*,

770 F.3d 285, 287-288 & n.1 (4th Cir. 2014) (collecting cases). At no point in any of the five sentencing proceedings did the court rely on the default drug guidelines to determine either the starting point of the substantial-assistance departure or the extent of that departure.

At petitioner Koons' sentencing, the district court agreed with the Probation Office's calculations and recognized that the statutory minimum of 240 months "trump[ed] the advisory guideline range." J.A. 104; see J.A. 114-115. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his testimony before a grand jury and provision of timely information that helped the government to obtain a search warrant. J.A. 107-116. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a 25% departure from the 240-month statutory minimum. J.A. 114-116. The court accordingly sentenced him to 180 months of imprisonment. J.A. 116.

At petitioner Putensen's sentencing, the district court agreed with the Probation Office's calculations and recognized that "the guideline provision is a mandatory life sentence" as a result of the statutory minimum. J.A. 158; see J.A. 174. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his testimony before a grand jury and the detailed information he had provided about methamphetamine-production operations. J.A. 159-163, 174-175. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a

35% departure from the statutory minimum of life imprisonment, which the court treated as a sentence of 406 months for purposes of that calculation. J.A. 167-168, 174-177. The court accordingly sentenced him to 264 months of imprisonment. J.A. 177.

At petitioner Feauto's sentencing, the district court agreed with the Probation Office's calculations and recognized that the statutory minimum of 240 months "trump[ed] the advisory guideline range." J.A. 126. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his participation in several controlled transactions that led to the indictment of at least four criminal defendants. J.A. 127-133, 148-149. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a 45% departure from the 240-month statutory minimum. J.A. 126, 153. The court accordingly sentenced him to 132 months of imprisonment. J.A. 154.

At petitioner Gutierrez's sentencing, the district court agreed with the Probation Office's calculations and recognized that "the advisory guideline range becomes the mandatory minimum of 240" months. J.A. 203. The court determined, however, that such a sentence did not adequately account for the quantity of methamphetamine he had admitted to distributing or the numerous home-invasion robberies he had committed. J.A. 204-214; see Supp. J.A. 81-90. The court accordingly decided to vary upward "from the mandatory minimum of 240 months" and determined that the appropriate sentence without a substantial-assistance departure would be 300 months. J.A. 218. The court considered his assistance in a sealed portion of the hearing,

see Supp. J.A. 81-90, and determined to "depart downward from 300 months down to 192 months" of imprisonment, J.A. 216; see J.A. 216-219.

At petitioner Gardea's sentencing, the district court agreed with the Probation Office's calculations and recognized that the "advisory guideline range [was] trumped by the mandatory minimum" of 120 months. J.A. 197; see J.A. 185. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his testimony before a grand jury. J.A. 196-198. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a 30% departure below the 120-month statutory minimum. J.A. 197-198. The court accordingly sentenced him to 84 months of imprisonment. J.A. 198.

B. Sentence Reduction Proceedings

1. In November 2014, the Sentencing Commission adopted Amendment 782 to the Sentencing Guidelines, which lowered the base offense levels in the default drug guidelines, Sentencing Guidelines § 2D1.1, by two levels for offenses involving certain drug quantities. See Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014); see 28 U.S.C. 994(*o*) (authorizing amendments). The Commission made Amendment 782 retroactive. Sentencing Guidelines App. C Supp., Amend. 788 (Nov. 1, 2014); see 28 U.S.C. 994(u) (authorizing retroactive amendments). Under Amendment 782, the default drug-guidelines calculations in petitioners' cases resulted in ranges even further below the relevant statutory minimums, which remained unchanged. J.A. 49.

2. After Amendment 782 was promulgated, the district court *sua sponte* directed petitioners and the government to address whether petitioners were eligible

for sentence reductions under 18 U.S.C. 3582(c)(2). See J.A. 61-62 n.3. Section 3582(c)(2) authorizes a district court to reduce the previously imposed sentence of "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). In such a case, "the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

Petitioners and the government both took the position that petitioners were eligible for sentence reductions under Section 3582(c)(2). The parties relied on the 2014 addition of subsection (c) to the policy statement applicable to sentence reductions, Sentencing Guidelines § 1B1.10. Section 1B1.10(c) states that "[i]f the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1." *Ibid.* As noted above, Sentencing Guidelines § 5G1.1(b) provides that a statutory minimum "shall be the guideline sentence" when it exceeds the otherwise-applicable guidelines range. Thus, under Sentencing Guidelines § 1B1.10(c), petitioner Feauto's "amended guideline range," for example, would be calculated without regard to the still-extant 240-month statutory minimum and would thus be lower than the 240-month

"guideline sentence" that Section 5G1.1(b) had dictated at his sentencing. See J.A. 57-59, 70.

After a hearing, as well as additional briefing from federal public defender offices, the district court issued an order in petitioner Feauto's case "disagree[ing] with the parties' argument that the Sentencing Commission has the authority to use Amendment 782, or any other amendment to the Sentencing Guidelines, to 'nullify' a mandatory minimum sentence established by Congress." J.A. 60. The court noted that its determination came "with significant irony" because the court had "consistently" and "vehemently" disagreed with most statutory minimum sentences on policy grounds. J.A. 59-60 & n.2.

The district court explained that "a defendant whose mandatory minimum exceeded his guideline range was not a defendant sentenced pursuant to a guideline range, but a defendant sentenced pursuant to a mandatory minimum and a statutorily-permissible reduction from the mandatory minimum for substantial assistance." J.A. 86. The court observed that the "limited authority provided in the first sentence of § 3553(e) is only to 'impose a sentence below a level established by statute as a minimum sentence *so as to reflect a defendant's substantial assistance.*'" J.A. 79 (quoting 18 U.S.C. 3553(e)) (emphasis added by court). The court cited circuit precedent "emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only factors related to a defendant's substantial assistance." *Ibid.* (citing *Billue*, 576 F.3d at 902-904). And the court stressed that "Amendment 782 is *not* an amendment to the 'substantial assistance' guidelines." J.A. 77-78.

The district court additionally observed that permitting a sentence reduction for defendants like petitioners would produce "pernicious consequences" and "create[] the very kind of unwarranted disparity the guidelines were intended to avoid." J.A. 61, 86. The court explained that "a defendant being sentenced for the first time under Amendment 782" would be subject to the "mandatory minimum sentence as a 'starting point' for any substantial assistance reduction," J.A. 87 (emphasis omitted), and it noted that petitioner Feauto in particular would "receive the identical sentence" in that circumstance, J.A. 89. It contrasted such continued application of statutory minimums to current and future defendants with lower sentences such as those petitioners were seeking, which would constitute "a second reduction for substantial assistance," this time "without regard to that defendant's statutory mandatory minimum sentence." J.A. 87 (emphasis omitted). The court also noted "another anomaly" with deeming defendants like petitioners eligible for reductions, in that even though Amendment 782 was designed "to ameliorate the harshness of the drug guidelines, not to reward cooperators twice" for their cooperation, the only defendants subject to statutory minimum drug sentences who would be eligible for Section 3582(c)(2) reductions under the parties' position would be cooperators. J.A. 88-89.

The district court subsequently issued a brief order denying sentence reductions to petitioners Koons, Putensen, Gutierrez, and Gardea. J.A. 96-97. While petitioners' appeal was pending, President Obama granted petitioner Putensen's request for clemency, reducing his sentence from 264 months to 188 months. See Supp. J.A. 49-50.

3. On appeal, the government maintained its view that petitioners were eligible for sentence reductions under Section 3582(c)(2) and requested a remand. Gov't C.A. Br. 6-7. The court of appeals affirmed. J.A. 44-56.

The court of appeals determined that petitioners were not eligible for sentence reductions under Section 3582(c)(2) because their sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." J.A. 49 (quoting 18 U.S.C. 3582(c)(2)). The court explained that each petitioner's sentence was instead "'based on' his statutory mandatory minimum sentence and his substantial assistance." J.A. 52. The court observed that in *Freeman* v. *United States*, 564 U.S. 522 (2011), "all nine Justices construed the term 'based on' as imposing a substantive limitation on § 3582(c)(2)" eligibility that was "inconsistent" with a reduction in petitioners' sentences. J.A. 55.

The court of appeals explained that "[w]hen the district court grants * * * a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point." J.A. 52. The court observed that even if Sentencing Guidelines § 5G1.1(b) "did not exist, the district court would still have set [petitioners'] sentences at the mandatory minimum before considering a substantial assistance departure" and that "if initially sentenced today with Amendment 782 in effect, [petitioners] would be 'stuck with that mandatory minimum sentence as a "starting point" for any substantial assistance reduction.'" *Ibid.* (citation omitted). The court additionally explained that Section 3553(e) requires "[a]ny 'reduction below the statutory minimum'" to be "'based exclusively on assistance-

related considerations.'" *Ibid.* (quoting *United States* v. *Williams*, 474 F.3d 1130, 1131 (8th Cir. 2007)). "In essence," the court observed, "the advisory sentencing range became irrelevant." *Ibid.* (citation omitted).

4. As noted at the certiorari stage of this case (Br. in Opp. 11), the government has reconsidered its position and now agrees with the court of appeals' decision in this case and with the Tenth Circuit's similar holding in *United States* v. *C.D.*, 848 F.3d 1286 (2017), petition for cert. pending, No. 16-9672 (filed June 20, 2017).

SUMMARY OF ARGUMENT

The lower courts correctly determined that petitioners are not eligible for sentence reductions under Section 3582(c)(2) because their sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2). Petitioners' sentences did not depend in any way upon the default drug guidelines that the Commission modified in Amendment 782, which dropped out of their sentencing proceedings once it became clear that relying on them would produce a sentence below the statutory minimum. The law did not allow the district court to reintroduce those guidelines when considering petitioners' substantial-assistance departures, and the court did not do so. Petitioners are not entitled to windfall relief that would produce sentences shorter than those they would receive if sentenced for the first time today.

As a threshold matter, petitioners are not eligible for sentence reductions under Section 3582(c)(2) because their "sentencing range[s]" were statutory minimums that the Commission did not and cannot "lower[]." 18 U.S.C. 3582(c)(2). The Commission-modifiable "sentencing range" referenced in Section 3582(c)(2) is most naturally understood as the Commission-recommended

"sentencing range" that 18 U.S.C. 3553(a)(4) requires a district court to consider when imposing a sentence. The Guidelines contain specific instructions for the calculation of that "sentencing range," and in a case in which it would otherwise fall below a statutory minimum, the "sentencing range" is set at the statutory minimum. See Sentencing Guidelines §§ 1B1.1(a), 5G1.1(b). The filing of a motion for a substantial-assistance departure under 18 U.S.C. 3553(e) or Sentencing Guidelines § 5K1.1 does not affect the determination of the numerical "sentencing range," but instead only allows a departure below it.

Even if the term "sentencing range" were construed more broadly, petitioners' sentencing ranges would still not be "based on" the default drug guidelines modified in Amendment 782. Guidelines that would apply in the absence of a superseding statutory minimum have no role in the sentencing of a cooperator under 18 U.S.C. 3553(e). In stark contrast to the neighboring subsection (18 U.S.C. 3553(f)), Section 3553(e) expressly ties the authority to grant a substantial-assistance departure to the sentence "established by statute as a minimum sentence"; it expressly limits the extent of the departure to the degree that "reflect[s] a defendant's substantial assistance"; and the policy statement implementing it does not allow for consideration of factors unrelated to substantial assistance. 18 U.S.C. 3553(e); see Sentencing Guidelines § 5K1.1. Thus, as every court of appeals to address the question has recognized, a Section 3553(e) departure is a departure *from the statutory minimum* that "must be based *exclusively* on assistance-related considerations," not on any other considerations embodied in the Guidelines. J.A. 52 (emphasis added; citation omitted); see, *e.g.*, *United States* v.

Spinks, 770 F.3d 285, 287-288 & n.1 (4th Cir. 2014) (collecting cases). The district court here accordingly did not consider the default drug guidelines in granting petitioners' substantial-assistance departures, and none of the interpretations of "based on" in the separate opinions in *Freeman* v. *United States*, 564 U.S. 522 (2011), would suggest that a modification of those guidelines renders petitioners eligible for sentence reductions.

Although the Commission's policy statement for Section 3582(c)(2) sentence reductions, Sentencing Guidelines § 1B1.10, anticipates that defendants in petitioners' situation will be eligible for reductions, the policy statement alone cannot authorize such reductions. As neither a legal nor a practical matter does the Commission have the ability to construe a previously imposed sentence as "based on" a guideline when in fact it was not. Granting sentence reductions to petitioners would also create the very sort of sentencing disparities that Section 3582(c)(2) is designed to eliminate. Among other things, it would anomalously put petitioners in a better position for having been sentenced *before* the Commission lowered the drug guidelines, by allowing them to serve lower sentences than an identically situated current or future defendant.

ARGUMENT

THE STATUTORY MINIMUM SENTENCES FOR PETITIONERS' OFFENSES PRECLUDE THEM FROM SEEKING SENTENCE REDUCTIONS UNDER 18 U.S.C. 3582(c)(2)

The general rule that a federal court may not "'modify a term of imprisonment once it has been imposed'" contains a "narrow exception[]" in 18 U.S.C. 3582(c)(2) for "'a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has

subsequently been lowered by the Sentencing Commission.'" *Freeman* v. *United States*, 564 U.S. 522, 526-527 (2011) (plurality opinion) (quoting 18 U.S.C. 3582(c) and (2)). That narrow exception does not encompass a circumstance in which the Commission has lowered a "range" that was already lower than the statutory minimum for the defendant's crime. Neither a sentence at the statutory minimum, nor a departure below that level calibrated solely as a reward for "substantial assistance" to law enforcement, 18 U.S.C. 3553(e), can be considered to have been "based on" any "sentencing range" that the Commission has lowered, 18 U.S.C. 3582(c)(2). Petitioners' contrary view of sentencing law is at odds with the procedures required and followed in their own cases. And it would introduce the very sort of timing-based disparity that Section 3582(c)(2) is designed to eliminate, by allowing their sentences to be reduced to a level below what they would receive if sentenced for the first time today.

A. The "Sentencing Ranges" For Petitioners' Offenses Were Statutory Minimums That The Commission Cannot "Lower"

Petitioners are ineligible for sentence reductions under Section 3582(c)(2) because their "sentencing range[s]" were not a function of the default drug guidelines that the Commission subsequently lowered in Amendment 782. 18 U.S.C. 3582(c)(2). Their "sentencing ranges" were instead the statutory minimum sentences required by 21 U.S.C. 841(b)(1).

1. Congress enacted Section 3582(c)(2) as part of the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, Tit. II, ch. II, §§ 212(a), 217(a), 98 Stat. 1987-1992, 2017-2026 (18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991 *et seq.*), which also created the Sentencing Commission. See

Mistretta v. *United States*, 488 U.S. 361, 367-368 (1989). The Act directs the Commission to "promulgate Sentencing Guidelines and to issue policy statements regarding the Guidelines' application." *Dillon* v. *United States*, 560 U.S. 817, 820 (2010); see 28 U.S.C. 994(a). Those guidelines and policy statements provide two of the factors that 18 U.S.C. 3553(a) requires a district court to consider at sentencing. See 18 U.S.C. 3553(a)(4) and (5); see also, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 49-50 & n.6 (2007). Specifically, under Section 3553(a)(4), the sentencing court must consider "the sentencing range established" by the Commission for "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines," and under Section 3553(a)(5), the sentencing court must consider "any pertinent policy statement * * * issued by the Sentencing Commission." 18 U.S.C. 3553(a)(4)(A) and (5)(A). Since *United States* v. *Booker*, 543 U.S. 220 (2005), the guidelines and policy statements have been "effectively advisory," rather than mandatory, when consulted for those purposes. *Pepper* v. *United States*, 562 U.S. 476, 490 (2011) (citation omitted).

The Sentencing Reform Act "also charged the Commission with periodically reviewing and revising the Guidelines." *Dillon*, 560 U.S. at 820; see 28 U.S.C. 994(*o*). When the Commission amends the Guidelines in a manner that would result in lower advisory sentences for a particular offense, "the Commission must determine 'in what circumstances and by what amount the sentences of prisoners'" who are already "'serving terms of imprisonment for the offense may be [retroactively] reduced.'" *Dillon*, 560 U.S. at 820 (quoting 28 U.S.C. 994(u)). To the extent that the Commission chooses to make its amendment retroactive, Section 3582(c)(2)

then allows a district court to "reduce the term of imprisonment * * * consistent with applicable policy statements issued by the Sentencing Commission," for a defendant "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." See *id.* at 824-825 (citation omitted).

2. In petitioners' cases, the "sentencing range" for purposes of Section 3582(c)(2) was the statutory minimum under 21 U.S.C. 841(b)(1)—not any range calculated based on the drug guidelines that the Commission later amended.

The term "sentencing range" appears in three places in the Sentencing Reform Act: (1) in 28 U.S.C. 994(b)(1), which directs that "the guidelines promulgated" by the Commission must "establish a sentencing range that is consistent with all pertinent provisions of" the federal criminal code; (2) in 18 U.S.C. 3553(a)(4)(A), which instructs a court to consider "the sentencing range established" by the Commission for "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines" in "determining the particular sentence to be imposed"; and (3) in 18 U.S.C. 3582(c)(2), which authorizes a postjudgment sentence reduction for a defendant whose sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

Under ordinary principles of statutory interpretation, "'identical words used in different parts of the same statute' carry 'the same meaning.'" *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (quoting *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005)). The inference of common meaning is particularly strong when Congress enacted the same words in

the same statute at the same time. See, *e.g.*, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 570-571 (2012). Thus, the "sentencing range" that a defendant's sentence must be "based on" for purposes of Section 3582(c)(2) is the same "sentencing range established" by the Guidelines, 18 U.S.C. 3553(a)(4), which must, in turn, be "consistent with all pertinent provisions of" federal criminal law, 28 U.S.C. 994(b)(1), including statutory minimum sentences, 21 U.S.C. 841(b)(1)(A) and (B). A contrary interpretation—under which the "sentencing range" for purposes of Section 3582(c)(2) would not be required to be consistent with the relevant statutes, or would be different from the one that the district court considered at sentencing—would make little sense.

When a defendant's guidelines calculation would otherwise produce a range below the statutory minimum for his offense, that statutory minimum *is* his "sentencing range" under the Sentencing Reform Act. The "sentencing range" that the district court is required to consider under 18 U.S.C. 3553(a)(4) is determined by an algorithm set forth in Sentencing Guidelines § 1B1.1(a). See *ibid.* (specifying how the "court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4))"). As petitioners observe (Br. 21), Section 1B1.1(a) of the Guidelines directs district courts to follow eight steps, in a specific sequence, to determine a defendant's "guideline range." The first five steps produce the defendant's "offense level" by applying the base offense level that corresponds to the offense of conviction and adjusting that level upward or downward to account for certain factors relating to the offender and the offense, such as a managerial role or acceptance of responsibility. Sentencing Guidelines § 1B1.1(a)(1)-(5). At the sixth step, the court

calculates the defendant's criminal history category. *Id.* § 1B1.1(a)(6). The seventh step directs the court to determine "the guideline range * * * that corresponds to the offense level and criminal history category" in the sentencing table in the Commission's Guidelines Manual. *Id.* § 1B1.1(a)(7).

The eighth and final step ensures that a statutory minimum will override any potential lower guidelines range, such that the "sentencing range" the court considers under Section 3553(a)(4) accords with statutory law. See 28 U.S.C. 994(b)(1). That step requires the court to determine whether any other "sentencing requirements" affect the calculated range. Sentencing Guidelines § 1B1.1(a)(8). It expressly directs a court to consult, *inter alia*, "Part * * * G of Chapter Five." *Ibid.* That Part includes Section 5G1.1, which explains the process to follow if the calculation after the first seven steps conflicts with a statutory requirement. Cf. *Neal* v. *United States*, 516 U.S. 284, 294 (1996) (recognizing that Section 5G1.1 reflects the Commission's understanding that a "statute controls" if it "conflict[s]" with "the Guidelines calculation"). Specifically, Section 5G1.1(b) directs that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence *shall be* the guideline sentence." Sentencing Guidelines § 5G1.1(b) (emphasis added).

The presentence reports in petitioners' cases illustrate the relevant determination. In each case, the Probation Office calculated an initial guidelines range that looked to Sentencing Guidelines § 2D1.1—the default drug guidelines that Amendment 782 later modified—for the base offense level. Supp. J.A. 16-17, 39-41, 74-

76, 111-113, 126-128. But because that calculation resulted in a range below the applicable statutory minimum, each report recognized that the ultimate "guideline range" or "guideline term" would be the statutory minimum. See *id.* at 17 ("[B]ecause of the statutory mandatory minimum, the guideline range for imprisonment becomes 240 months."); *id.* at 41 ("[B]ecause of the statutory mandatory minimum, the guideline range for imprisonment becomes life."); *id.* at 76 ("[T]he statutorily required minimum sentence of 20 years is greater than the maximum of the applicable guideline range; therefore, the guideline term of imprisonment is 240 months."); *id.* at 113 ("[T]he statutorily authorized minimum sentence is greater than the maximum of the applicable guideline range; therefore, the guideline term of imprisonment is 240 months."); *id.* at 128 ("[T]he statutorily required minimum sentence of 10 years is greater than the maximum of the applicable guideline range; therefore, the guideline term of imprisonment is 120 months."). Thus, in determining petitioners' sentencing ranges, the statutory minimum sentences "trump[ed]" the otherwise-applicable guidelines. *Dorsey* v. *United States*, 567 U.S. 260, 266 (2012).

3. The government's motions for substantial-assistance departures under 18 U.S.C. 3553(e) and Sentencing Guidelines § 5K1.1 did not change the "sentencing range[s]" in petitioners' cases. 18 U.S.C. 3582(c)(2). Notwithstanding those motions, the "sentencing range" for each petitioner remained the statutory minimum, not a range calculated from the drug guidelines.

Section 3553(e) provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as

a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. 3553(e). It further provides that "[s]uch sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. 994]." 18 U.S.C. 3553(e). But it does not refer to, or purport to allow modification of, a defendant's "sentencing range."

Nor does Sentencing Guidelines § 5K1.1, the policy statement that both guides substantial-assistance departures under Section 3553(e) and authorizes substantial-assistance departures in the context of the Guidelines themselves. Under 28 U.S.C. 994(n), the Commission is required to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 5K1.1 complies with that directive by providing that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." Sentencing Guidelines § 5K1.1. The policy statement's instructions for how "[t]he appropriate reduction shall be determined" are applicable to both a motion under Section 5K1.1 itself and the separate motion that the government must file under Section 3553(e) to authorize a substantial-assistance departure below the statutory minimum. *Id.* § 5K1.1(a); see *id.*

§ 5K1.1, comment. (n.1); *Melendez* v. *United States*, 518 U.S. 120, 129-130 & n.10 (1996).

The Guidelines Manual does not treat consideration of the substantial-assistance factors outlined in Section 5K1.1 as part of the "sentencing range" to be computed for purposes of 18 U.S.C. 3553(a)(4). Section 5K1.1(a) enumerates a nonexhaustive set of "reasons" that may inform a substantial-assistance departure in a particular defendant's case. Sentencing Guidelines § 5K1.1(a). The determinations contemplated by Section 5K1.1 do not involve adding to or subtracting from a defendant's offense level or criminal history category; they require non-numerical considerations particularized to a specific defendant, and are thus not germane to the "sentencing range" for a "category of offense committed by" a "category of defendant" under 18 U.S.C. 3553(a)(4)(A).

Section 5K1.1's application is accordingly not one of the eight steps for calculating the numerical "range" under Sentencing Guidelines § 1B1.1(a) for purposes of Section 3553(a)(4). Cf. *Peugh* v. *United States*, 569 U.S. 530, 535 (2013) (describing guidelines as "yield[ing] a predetermined * * * range of months"). Instead, the Guidelines instruct that *after* calculating the numerical range for purposes of Section 3553(a)(4), the "court shall *then* consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5)." Sentencing Guidelines § 1B1.1(b) (first emphasis added). That instruction cites 18 U.S.C. 3553(a)(5), which requires a sentencing court to consider—as a sentencing factor *separate* from the "sentencing range" under Section 3553(a)(4)—"any pertinent policy statement" promulgated by the

Commission. Thus, even in a case involving a substantial-assistance departure, the "sentencing range" remains the same. And in a case like petitioners'—where the otherwise-applicable guidelines calculation would produce a sentence below the statutory minimum—Sentencing Guidelines § 5G1.1(b) sets the "sentencing range" at the statutory minimum.

Contrary to petitioners' contention (Br. 26), that would remain true even if a motion under Section 3553(e) allowed the district court to impose a sentence below the statutory minimum for any reason, rather than just for reasons related to the defendant's substantial assistance. But see Part B.1, *infra* (explaining that only substantial-assistance considerations are permissible). Although petitioners rely on that interpretation of Section 3553(e) to argue that no "statutorily required minimum sentence" exists for purposes of Sentencing Guidelines § 5G1.1(b) once a Section 3553(e) motion is filed, the Guidelines Manual itself considers a statutory minimum to be a "statutorily required minimum sentence" even in that circumstance. Br. 26 (citation and emphasis omitted). The commentary to Sentencing Guidelines § 5K1.1 describes a Section 3553(e) motion as an event that "may justify a sentence *below a statutorily required minimum sentence*." Sentencing Guidelines § 5K1.1, comment. (n.1) (emphasis added). That description cannot be squared with petitioners' contention that a Section 3553(e) motion inherently eliminates a "statutorily required minimum sentence," as that term is used in the Guidelines. Cf. *Stinson* v. *United States*, 508 U.S. 36, 42-43 (1993) (noting significance of policy statements and commentary under Sentencing Guidelines § 1B1.7).

The Guidelines' approach to the interaction of statutory minimums and substantial-assistance departures is consistent with the sentencing scheme's overarching distinction between the "sentencing range" for a typical offender (which is sometimes a statutory minimum) and individualized factors that may warrant a departure for a particular offender (such as substantial assistance). See, *e.g.*, 18 U.S.C. 3553(a)(4)-(5); Sentencing Guidelines §§ 1B1.1(a)-(b), 5K1.1, comment. (background). And where, as here, a statutory minimum provides the relevant "sentencing range," it is not a "sentencing range" that the Commission can "lower[]." 18 U.S.C. 3582(c)(2); see, *e.g.*, *Dorsey*, 567 U.S. at 266-267; *Neal*, 516 U.S. at 290. It therefore cannot serve as the predicate for a sentence reduction under Section 3582(c)(2).

B. The Substantial-Assistance Departures That Petitioners Received Under 18 U.S.C. 3553(e) Were Not "Based On" The Later-Amended Drug Guidelines

In any event, even under the broadest conceivable interpretation of the term "sentencing range," a defendant whose otherwise-applicable guidelines calculation was superseded by a statutory minimum was not sentenced "based on" that prefatory calculation, 18 U.S.C. 3582(c)(2). The relevant statutes, guidelines, and policy statements all dictate that a defendant who is thus subject to a statutory minimum, but who receives a lower sentence pursuant to a substantial-assistance motion under Section 3553(e), is sentenced "based on" the statutory minimum and individualized factors bearing on the proper reward for his substantial assistance—not "based on" any guideline that might otherwise have applied. Petitioners' contrary view of substantial-assistance departures is at odds with the statutory sentencing framework, the law that every circuit has applied on

direct review of such departures, and the procedures followed at their own sentencings.

1. A departure under Section 3553(e) is anchored to the statutory minimum

As the court of appeals correctly recognized, "[w]hen the district court grants * * * a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point." J.A. 52. Indeed, every court of appeals to consider that issue has so held. See, *e.g.*, *United States* v. *Joiner*, 727 F.3d 601, 609 (6th Cir. 2013), cert. denied, 134 S. Ct. 1357 (2014); *United States* v. *Mills*, 613 F.3d 1070, 1076 (11th Cir. 2010); *United States* v. *Roa-Medina*, 607 F.3d 255, 260-261 (1st Cir. 2010); *United States* v. *Carter*, 595 F.3d 575, 578-579 (5th Cir. 2010) (per curiam); *United States* v. *Jackson*, 577 F.3d 1032, 1035 (9th Cir. 2009); *United States* v. *Hood*, 556 F.3d 226, 235 (4th Cir.), cert. denied, 558 U.S. 921 (2009); *United States* v. *Poole*, 550 F.3d 676, 680 (7th Cir. 2008); *United States* v. *A.B.*, 529 F.3d 1275, 1284-1285 (10th Cir.), cert. denied, 555 U.S. 962 (2008).

Section 3553(e) authorizes a sentencing court, following a motion by the government, "to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. 3553(e). The plain language of that authorization anchors any resulting sentence to the "level established by statute as a minimum sentence," by specifying the limited circumstances in which a court may impose a sentence "below" that level. *Ibid.* Section 3553(e)'s title—"Limited authority to impose a sentence below a statutory minimum"—

likewise treats the "statutory minimum" as the baseline for the sentences that are authorized. *Ibid.* (capitalization altered); see *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'") (citation omitted); see, *e.g.*, *United States* v. *Williams*, 474 F.3d 1130, 1132 (8th Cir. 2007) (relying on title of Section 3553(e)); *United States* v. *Ahlers*, 305 F.3d 54, 59 (1st Cir. 2002) (same).

This Court has accordingly described Section 3553(e) as allowing for "a departure below the statutory minimum," *Melendez*, 518 U.S. at 130, not a departure relative to the Guidelines. Indeed, it has held that even if a sentencing court is authorized to grant a substantial-assistance departure from the Guidelines themselves, a separate motion relying on Section 3553(e) is necessary to "request[] or authoriz[e] a departure below the statutory minimum." *Ibid.* For example, if a defendant's guidelines range is 135 to 168 months of imprisonment, but he is subject to a 120-month statutory minimum, the court may not impose a sentence below 120 months unless the government files a motion that specifically references Section 3553(e) (not just Section 5K1.1). *Id.* at 122-123. The requirement that, irrespective of the Guidelines, the government must file a motion under Section 3553(e) to allow for a departure below a statutory minimum confirms that the statutory minimum is the starting point for the Section 3553(e) departure.

Petitioners' characterization of Section 3553(e) as allowing a defendant who provides substantial assistance to "escape," to be "relieved of," or to be "free" from a statutory minimum is correct only in the limited sense

that a Section 3553(e) motion allows for a departure that would not otherwise be available. Br. 26, 28 (brackets and citation omitted). The statute authorizes only an anchored departure from, not the complete elimination of, that statutory minimum. The contrast between Section 3553(e) and the neighboring subsection—18 U.S.C. 3553(f), which Congress added in 1994, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1985—is telling. Unlike Section 3553(e), which authorizes the sentencing court (if certain criteria are met) "to impose a sentence below a level established by statute as a minimum sentence," 18 U.S.C. 3553(e), Section 3553(f) authorizes a court (if different criteria are met) to impose a sentence "without regard to any statutory minimum sentence," 18 U.S.C. 3553(f).

The "sharp divergence between these regimes," particularly their "radically" different text, "leads inexorably to the conclusion that Congress had different plans in mind for the operation and effect of the two provisions." *Ahlers*, 305 F.3d at 58-59. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). That principle applies even when the two subsections were enacted at different times. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (recognizing that the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute").

Petitioners "offer no explanation as to why two provisions with such different architecture and such different goals should be deemed to march in lockstep." *Ahlers*, 305 F.3d at 59.

2. The proper extent of a Section 3553(e) departure depends solely on the appropriate reward for the defendant's substantial assistance

As all 11 courts of appeals to consider the question have recognized, Section 3553(e) authorizes a departure below a statutory minimum only to the extent necessary to reward the defendant for his substantial assistance. See *United States* v. *Spinks*, 770 F.3d 285, 287-288 & n.1 (4th Cir. 2014) (collecting cases); *United States* v. *Winebarger*, 664 F.3d 388, 396 (3d Cir. 2011) (same), cert. denied, 134 S. Ct. 181 (2013). It does not authorize a district court to consider guidelines calculations that fell below the statutory minimum for the purpose of treating the defendant like someone charged with a crime that carried no statutory minimum sentence.

a. Section 3553(e) allows for a departure "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. 3553(e). Although a district court has discretion to determine the extent of that departure, the text of Section 3553(e) "specifies precisely how a sentencing court's authority is limited." *Williams*, 474 F.3d at 1132. The "placement" of the qualifier "'so as to reflect a defendant's substantial assistance'" immediately after the authorization to depart "'below a level established by statute'" as a minimum sentence demonstrates "that the authority granted is limited thereby." *Ahlers*, 305 F.3d at 60 n.4 (quoting 18 U.S.C. 3553(e)).

That textual choice is significant. "Presumably, Congress could have written the first sentence of § 3553(e) to read, 'Upon motion of the Government *indicating that a defendant has given substantial assistance in the investigation or prosecution of another person who has committed an offense*, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence.'" *Winebarger*, 664 F.3d at 392. But Congress did not do so. Instead, by "explicitly" stating that the departure should "reflect" a defendant's assistance, Congress ensured that a court does not have "carte blanche to sentence a defendant below a statutory minimum sentence based on non-assistance-related factors once it is established that the defendant provided assistance to the government." *Id.* at 392-393. Section 3553(e)'s title underscores the point by describing the court's "authority to impose a sentence below" the statutory minimum as "limited." 18 U.S.C. 3553(e) (capitalization altered); see *Florida Dep't of Revenue*, 554 U.S. at 47.

b. The substantial-assistance-focused nature of a Section 3553(e) departure is additionally reinforced by the congruence between the language of Section 3553(e) and language limiting courts' discretion to modify sentences under the amendments to Federal Rule of Criminal Procedure 35(b) enacted at the same time as Section 3553(e). See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, §§ 1007(a), 1009(a), 100 Stat. 3207-7, 3207-8. Before Section 3553(e) was enacted in 1986, Rule 35(b) allowed a district court to modify a sentence within a certain period following judgment, without any express limitation as to the permissible reasons for such a modification. See Fed. R. Crim. P. 35(b) (1985). In conjunction with Section 3553(e)'s enactment, and

piggybacking on a similar amendment to Rule 35 two years earlier whose effective date had been delayed, see SRA §§ 215(b), 235, 98 Stat. 2015-2017, 2031-2033; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728, Congress significantly narrowed the Rule to permit only modifications for substantial assistance.

As narrowed, Rule 35(b) only allowed a court, following a government motion, to lower a previously imposed sentence (including below a statutory minimum) "*to reflect a defendant's subsequent, substantial assistance* in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission." Fed. R. Crim. P. 35(b) (1987) (Amendment) (emphasis altered). The "reflect" language was removed by the Rules Committee in 2002 "as part of the general restyling of the Criminal Rules," Fed. R. Crim. P. 35 advisory committee's note (2002), and courts are not uniform in their interpretation of the current language, compare, *e.g.*, *United States* v. *Grant*, 636 F.3d 803, 814 (6th Cir. 2011) (en banc), cert. denied, 565 U.S. 931 (2011) and *United States* v. *Poland*, 562 F.3d 35, 41 (1st Cir. 2009), with *United States* v. *Tadio*, 663 F.3d 1042, 1047 (9th Cir. 2011), cert. denied, 566 U.S. 1029 (2012). But the import of the "reflect" language in both the amended Rule 35(b) and Section 3553(e) was expressly recognized at the time those provisions were introduced. The legislative package proposed by President Reagan made clear that the amendments to Rule 35(b) were of a piece with Section 3553(e) and would allow a reduction only "*to the extent that such assistance is a factor* in the applicable guidelines or policy statements of the Sentencing Commission." *The Drug Free*

America Act of 1986: Message from the President of the United States, H.R. Doc. No. 266, 99th Cong., 2d Sess. 118 (1986) (emphasis added) (1986 Message); see SRA §§ 215(b), 235, 98 Stat. 2015-2017, 2031-2033 (similar "factor" wording in 1984 amendment). The substantially identical language of Section 3553(e) necessarily imposes a similar limitation.

c. Petitioners err in contending (Br. 32-34) that a district court can "reflect a defendant's substantial assistance" to law enforcement, 18 U.S.C. 3553(e), by consulting a superseded guidelines calculation that was centered around the kind and quantity of drugs the defendant trafficked. Petitioners suggest that Section 3553(e) accomplishes that result by requiring that a sentence under it "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. 994]." Br. 20, 28 (citation omitted). They also rely (Br. 31-32) on 28 U.S.C. 994(n), which directs the Commission to "assure that the guidelines reflect the general appropriateness of imposing * * * a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance." But as this Court has explained, "the relevant parts of the statutes merely charge the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum." *Melendez*, 518 U.S. at 129. They do not provide that the statutory minimum disappears from the picture entirely or that a superseded guidelines calculation is resurrected.

Had Congress intended that result, it would have used the same language it employed in the neighboring

subsection, Section 3553(f), entitled "Limitation on applicability of statutory minimums in certain cases." 18 U.S.C. 3553(f) (capitalization altered). Section 3553(f) authorizes a sentence "pursuant to guidelines promulgated by the United States Sentencing Commission under [28 U.S.C. 994] without regard to any statutory minimum sentence," for certain minor drug offenders. *Ibid.* Section 3553(f), unlike Section 3553(e), unambiguously eliminates the applicability of the statutory minimum for all purposes and authorizes sentencing based on the otherwise-applicable guidelines calculation. Its text and title "show[] that Congress knew how to draft the kind of statutory language that petitioner[s] seek[] to read into" Section 3553(e). *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016). The omission of similar language in Section 3553(e) strongly indicates that "Congress intended a difference in meaning." *Loughrin*, 134 S. Ct. at 2390; see *Russello*, 464 U.S. at 23.

d. Tying a Section 3553(e) departure to a defendant's below-statutory-minimum guidelines calculation would undermine Section 3553(e)'s basic function. Unlike Section 3553(f), which is a "safety valve" designed to relieve less culpable drug offenders from the operation of statutory minimum sentences, see H.R. Rep. No. 460, 103d Cong., 2d Sess. 5 (1994), Section 3553(e) is simply a system for rewarding fully culpable defendants for assisting law enforcement. Section 3553(e) was enacted as part of an omnibus package that included many new statutory minimum drug penalties, including those in 21 U.S.C. 841(b)(1). The legislative package proposed by President Reagan explained that Section 3553(e) would obviate any need for prosecutors to reward cooperators

by charging "a less serious offense * * * to avoid mandatory minimum sentences," by allowing prosecutors to instead "reflect accurately" that a defendant had committed a crime warranting a statutory minimum, while still providing such a defendant with an incentive to cooperate. 1986 Message 118; see *id.* at 117.

Sentencing a cooperating defendant by reference to the guidelines calculation that would apply in the absence of a statutory minimum would treat him as though he were, in fact, charged with a "less serious offense"—*e.g.*, a non-recidivist version of drug-trafficking, see 21 U.S.C. 841(a)(1); cf. *United States* v. *Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013) (Gorsuch, J.) (describing Section 841(b)(1) as "a statute aimed at punishing recidivism"). Nothing suggests that the President or Congress intended that a recidivist cooperator be viewed for statutory purposes as a defendant who is not a recidivist at all. Rather, Section 3553(e) indicates that he should be sentenced like other recidivist offenders, except to the extent that his cooperation merits a reward.

e. Even assuming the Commission could permissibly adopt a non-reward-based approach to substantial-assistance sentencing, it has not done so. Instead, the Commission has complied with its mandate under Sections 3553(e) and 994(n) by promulgating Sentencing Guidelines § 5K1.1, which itself requires that substantial-assistance departures be premised on substantial-assistance-related factors. See *id.* § 5K1.1(a); *id.* § 5K1.1, comment. (n.1); *Melendez*, 518 U.S. at 129-130 & n.10; see also *Winebarger*, 664 F.3d at 394-395; *United States* v. *Pepper*, 412 F.3d 995, 999 (8th Cir. 2005) (collecting circuit cases that have reached that conclusion); *United States* v. *Casiano*, 113 F.3d 420, 429 (3d Cir.) (same), cert. denied 552 U.S. 887 (1997).

Section 5K1.1 does not direct a sentencing court considering a substantial-assistance departure under Section 3553(e) to consult any guidelines calculation that the statutory minimum may have superseded. Instead, it guides the district court in selecting a sentence below the statutory minimum through an illustrative list of reasons that may inform the court's "determin[ation] of the departure." *Melendez*, 518 U.S. at 129 & n.10. In particular, it lists (1) the court's and government's "evaluation of the significance and usefulness of the defendant's assistance"; (2) "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant"; (3) "the nature and extent of the defendant's assistance"; (4) "any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance"; and (5) "the timeliness of the defendant's assistance." Sentencing Guidelines § 5K1.1(a).

Although that list is not exhaustive, its exclusive focus on substantial assistance—rather than other considerations—indicates that the inquiry as a whole should turn on substantial-assistance-related factors. See, *e.g.*, *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 164 (2012) (deriving limitation from shared characteristics of items on nonexhaustive list); *Samantar* v. *Yousuf*, 560 U.S. 305, 317 (2010) (similar); *Winebarger*, 664 F.3d at 394 (applying "*ejusdem generis*" principle to Section 5K1.1). The commentary to Section 5K1.1 reinforces that interpretation. Cf. *Stinson*, 508 U.S. at 42-43. It explains that what may "justify a sentence below a statutorily required minimum sentence" is "substantial assistance in the investigation or prosecution of another person who has committed an of-

fense," without reference to any other potential considerations. Sentencing Guidelines § 5K1.1, comment. (n.1). It additionally clarifies that the "sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility," *id.* § 5K1.1, comment (n.2)—a reduction that is part of the separate default guidelines calculation, see *id.* § 3E1.1. And the background note makes clear that the reason for Section 5K1.1's "[l]atitude" as to the "relevant factors" is that the "nature, extent, and significance *of assistance* can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis." *Id.* § 5K1.1, comment. (background) (emphasis added).

f. Some courts of appeals considering substantial-assistance departures under Section 3553(e) have indicated that "after the court has determined the full extent of the downward departure it would award based on * * * substantial assistance," it may "consider other factors, including those in § 3553(a), to decide whether to depart to that full extent." *United States* v. *Williams*, 551 F.3d 182, 186 (2d Cir. 2009); see also, *e.g.*, *Winebarger*, 664 F.3d at 395; *Jackson*, 577 F.3d at 1036; cf. *United States* v. *Rublee*, 655 F.3d 835, 839 (8th Cir. 2011) (similar in context of postsentencing substantial-assistance motion under Fed. R. Crim. P. 35(b)), cert. denied, 565 U.S. 1240 (2012); but see, *e.g.*, *United States* v. *Fulton*, 431 Fed. Appx. 732, 733 (10th Cir. 2011) (Gorsuch, J.) (rejecting reliance on such considerations) (citing *A.B.*, 529 F.3d at 1284-1285).

That approach lacks a firm grounding in Section 3553(e) (or Section 5K1.1), although it could potentially be supported by a sentencing court's "overarching duty" to impose a "'sentence sufficient, but not greater

than necessary,' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)," *Pepper*, 562 U.S. at 491 (quoting 18 U.S.C. 3553(a)). But even assuming it is allowed, that approach provides no foundation for petitioners' open-ended view of substantial-assistance departures.

It does not appear that any court of appeals allows consideration of factors unrelated to substantial assistance to impose a *lower* sentence than substantial-assistance factors alone would permit. And the imposition of a *higher* sentence on a cooperator based on general sentencing factors is the functional equivalent of varying upward from the statutory minimum before granting an award for substantial assistance. See *A.B.*, 529 F.3d at 1285-1286; cf. J.A. 216-219 (following such a variance-based approach for petitioner Gutierrez). Nothing in such a procedure suggests that Section 3553(e) rewards substantial assistance by allowing a defendant to be sentenced pursuant to the guidelines calculation that would apply if he were not subject to a statutory minimum at all. See *Roa-Medina*, 607 F.3d at 260; *Hood*, 556 F.3d at 235-236.

3. The sentencing proceedings in petitioners' cases illustrate the proper procedure for a substantial-assistance departure under Section 3553(e)

The district court here correctly recognized that the government's Section 3553(e) motions did not authorize an open-ended sentencing, but instead only a limited substantial-assistance-focused departure.

a. As detailed above, see pp. 8-11, *supra*, the district court in each of petitioners' cases limited its departure below the relevant statutory minimum to the extent justified by each petitioner's substantial assistance, as informed by the factors in Sentencing Guidelines § 5K1.1.

In four of the cases, the district court relied on those factors to calculate the departure as a percentage of the statutory minimum. See J.A. 115-116, 148-153, 174-177, 197-198. In the fifth, the court relied on the factors to depart down a specified number of months from an upward variance from the statutory minimum. J.A. 216-218.

At no point in any of petitioners' sentencing proceedings did the district court suggest that its ultimate sentence was influenced by a calculation of the guidelines without regard to the applicable statutory minimums. Indeed, the record contains multiple indications to the contrary. In the case of petitioner Putensen, who was subject to a statutory-minimum term of life imprisonment, the court engaged in a lengthy discussion about the number of months that term represented, in order to inform its mathematical departure calculation. J.A. 159, 166-169. In two cases, the court either explicitly disclaimed, or expressed uncertainty about, its ability to consult the general sentencing factors under Section 3553(a). J.A. 115-116, 177-178. And in two cases, the court expressed interest in evidence or statistics about how other cooperators—not how nonrecidivist offenders not subject to statutory minimums—had been treated for sentencing purposes. J.A. 152-153, 188-193.

b. Notwithstanding its legal irrelevance, sentencing courts—and the government itself—do sometimes, as a practical matter, reference a guidelines calculation that has been superseded by a statutory minimum in the context of a Section 3553(e) motion. See, *e.g.*, *In re Sealed Case*, 722 F.3d 361, 363-364 (D.C. Cir. 2013) (describing Section 3553(e) sentencing where district court discussed "[t]he guideline range, if there had not been the mandatory minimum"); *United States* v. *Savani*,

733 F.3d 56, 59 (3d Cir. 2013) (describing Section 3553(e) sentencing where government requested a sentence within a superseded guideline range).

Such occurrences may reflect that some courts and parties reflexively follow the same procedures in all substantial-assistance cases, without distinguishing between cases in which the initial guidelines calculation is above the statutory minimum (in which case it remains relevant to the sentencing) and those in which the initial guidelines calculation is below the statutory minimum (in which case it does not). Petitioners cite (Br. 15-16, 23), for example, a letter to the Commission in which the government incorrectly failed to draw that distinction and described the relevant law in a manner at odds with its own longstanding litigating position. Compare Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legis., U.S. Dep't of Justice, to Hon. Patti B. Saris, U.S. Sentencing Comm'n 4 (Mar. 6, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf, with, *e.g.*, *United States* v. *Richardson*, 521 F.3d 149, 151 (2d Cir. 2008) (affirmative government appeal arguing that "the starting point for a reduced sentence" under Section 3553(e) "is the statutory minimum sentence" and that "the only factors to be considered in this case are those relating to [the defendant's] cooperation"). A sentencing judge's reference to a superseded guidelines calculation may also occur because the judge "'at least ha[s] in his or her mind' what the defendant's guidelines range is 'absent the mandatory minimum,'" Pet. Br. 23 (citation omitted), even though it falls outside the proper legal framework.

In any event, even assuming that judges in some districts have with some frequency pegged Section 3553(e)

departures to below-statutory-minimum guidelines calculations, see NAFD Amicus Br. 18-24, that practice is contrary to the law of every circuit that has addressed the issue. See pp. 29, 32, *supra*. Neither petitioners nor their amici identify any court of appeals decision expressly endorsing such a practice on direct review of a sentencing proceeding that exhibited it. They instead primarily rely on decisions arising in the context of Section 3582(c)(2) proceedings, where the district court at the original sentencing had (improperly) referred to a superseded guidelines calculation in the Section 3553(e) context. See *In re Sealed Case*, *supra*; *Savani*, *supra*. The question whether such references were proper was thus not directly presented, and to the extent those courts treated them as legally authorized, that was incorrect for all the reasons described above. Indeed, at least one of the decisions is in tension with prior circuit authority (that the majority did not directly address). See *Winebarger*, 664 F.3d at 395.

In any event, as just discussed, no such reference occurred at petitioners' sentencing proceedings. Although petitioners note (Br. 23) that some of their sentences wound up in the range that would have applied in the absence of a statutory minimum, the record demonstrates that was by happenstance—not design.

4. A below-statutory-minimum guidelines calculation is not a "sentencing range" on which a Section 3553(e) departure is "based"

Section 3582(c)(2) does not permit the conclusion that petitioners' sentences were "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The only role that the drug guidelines modified by Amendment 782 played at each petitioner's sentencing proceeding

was in a computation establishing that the sentence they recommended was inconsistent with statutory law (namely, the minimum sentence required by 21 U.S.C. 841(b)(1)) and should therefore be disregarded.

a. In ordinary language, a result is "based on" a particular consideration if that consideration is "the fundamental part," *Webster's Third New International Dictionary of the English Language* 180 (1981), or the "chief ingredient," *Webster's New International Dictionary of the English Language* 225 (2d ed. 1957), in producing the result. See also 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (defining "base" as the "main or most important element or ingredient" in something). In accord with that plain meaning, this Court in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), held that a legal claim is "based upon" a particular activity for purposes of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(2), only when the activity is the "basis" or "foundation" for the claim (*i.e.*, one of its "elements"), not when it is merely "connect[ed] with" or "led to the conduct" underlying the claim. *Nelson*, 507 U.S. at 357-358; see also *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395-397 (2015) (tort claim by plaintiff injured on train platform in Austria was "based upon" activity that caused injury in Austria, not train ticket sales in the United States).

In *Freeman*, *supra*, this Court addressed, but did not produce a majority opinion on, the meaning of "based on" in Section 3582(c)(2). The defendant in *Freeman* had entered into, and the district court in *Freeman* had accepted, a plea agreement that included a sentence that was binding on the court under Federal Rule of Criminal Procedure 11(c)(1)(C). See 564 U.S. at 528 (plurality opinion).

Four Justices concluded in an opinion by Justice Kennedy that a defendant in that position is eligible for a sentence reduction under Section 3582(c)(2) "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Freeman*, 564 U.S. at 530. The plurality stated that a sentence would be based on a guidelines sentencing range if, for example, "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it" or consults the subsequently lowered guidelines range in deciding whether to approve the plea agreement. *Id.* at 529.

Concurring in the judgment, Justice Sotomayor reasoned that "[t]o ask whether a particular term of imprisonment is 'based on' a Guidelines sentencing range is to ask whether that range serves as the basis or foundation for the term of imprisonment." *Freeman*, 564 U.S. at 535. She determined that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement generally will be "based on" the agreement itself, not on any guidelines range, even if it was considered by the district court. *Id.* at 535-536. She added, however, that "if a [Rule 11(c)(1)(C)] agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is 'based on' the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2)." *Id.* at 534.

A four-Justice dissent authored by Chief Justice Roberts identified the "based on" requirement as "the initial prerequisite" for a sentence reduction, and concluded that a defendant sentenced under a Rule

11(c)(1)(C) agreement can never satisfy that prerequisite. *Freeman*, 564 U.S. at 544-545. The dissent explained that such a defendant's sentence is always "based on" the agreement, not the guidelines, regardless of whether the court "considered the Guidelines in deciding whether to accept the agreement." *Id.* at 545.

b. The lower courts have divided over how to interpret the decision in *Freeman*, and this Court has granted a petition for a writ of certiorari to address that issue in *Hughes* v. *United States*, cert. granted, No. 17-155 (oral argument scheduled for Mar. 27, 2018). But none of the approaches in *Freeman* suggests that petitioners are eligible for sentence reductions here. See J.A. 55.

As discussed above, an initial guidelines calculation properly drops out of the sentencing equation altogether once the sentencing court determines that it falls below a statutory minimum, even if the defendant receives a substantial-assistance departure under Section 3553(e). A guideline that is superseded in that manner is not "a relevant part of the analytic framework the judge used to determine the sentence," *Freeman*, 564 U.S. at 530, under the *Freeman* plurality's approach; it does not "serve[] as the basis or foundation for the term of imprisonment, *id.* at 535, under Justice Sotomayor's approach; and any prefatory "consider[ation]," *id.* at 545, of the guideline falls far short of what the dissent's approach requires.

Because a below-statutory-minimum guidelines calculation should have no legal effect on a sentence imposed pursuant to Section 3553(e), no need exists to examine each case to determine whether the sentencing court may have erroneously referenced it. A sentencing court's commission of such an error at a sentencing proceeding is not a proper basis for granting a defendant the benefit of a sentence reduction to which he would

not otherwise be entitled. Cf. *Dillon*, 560 U.S. at 824-828 (proceedings under Section 3582(c)(2) do not encompass sentencing errors). But even if such a case-by-case approach were proper, it would not change the result here, where the record demonstrates that the superseded drug guideline did not affect petitioners' sentences. See pp. 5-11, 40-41, *supra*; accord *United States* v. *Rodriguez-Soriano*, 855 F.3d 1040, 1044-1046 (9th Cir. 2017) (finding defendant ineligible for sentence reduction absent indication in the record that his sentence was based on superseded drug guidelines), petition for cert. pending, No. 17-6292 (filed Oct. 6, 2017).

c. Petitioners err in contending (Br. 19-24) that their sentences were "based on" the drug-quantity guidelines because the district court "needed to consult" those guidelines as a procedural matter in order to determine that they had been superseded by the statutory minimums. See Sentencing Guidelines § 1B1.1(a). Such a sweeping interpretation of "based on" would expand Section 3582(c)(2)'s "narrow exception" to the "rule of finality," *Dillon*, 560 U.S. at 825-827, far beyond where any opinion in *Freeman* would take it. Indeed, even the petitioner in *Hughes* appears to disavow such an interpretation. See Pet. Br. 20, *Hughes*, *supra* (No. 17-155).

Petitioners rely primarily on the *Freeman* plurality's statement that "[t]he Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion." Pet. Br. 21 (citation omitted; brackets in original); see also *id.* at 22 (describing the guidelines as "'the beginning point' of [a court's] sentencing process") (quoting *Peugh*, 569 U.S. at 542). But *Freeman* did not

present any legal question involving a statutory minimum. And, in any event, the relevant question under Section 3582(c)(2) is not about the "Guidelines" writ large, but instead the particular set of guidelines calculations that the Commission has retroactively modified. See 18 U.S.C. 3582(c)(2). In the sentencing proceedings here, as in any properly conducted similar proceeding, the drug guidelines that the Commission subsequently lowered played no role in the sentences that the district court in fact imposed. Only the statutory minimums (which the Commission cannot alter) and substantial-assistance factors did.

Petitioners' proposed interpretation of "based on" cannot be squared with any ordinary understanding of that phrase. A taxpayer's bill, for example, is not "based on" the alternative minimum tax when he calculates that alternative tax only to confirm that it is lower than what he would otherwise pay. Cf. 26 U.S.C. 55. Or consider a real-estate company whose listing fee is "1 percent of the final sale price, subject to a minimum of" $4500. Alina Ptaszynski, *One Percent Listing Fee Arrives in 18 Additional Markets* (Oct. 2, 2017), https://www.redfin.com/blog/2017/10/ 1-percent-listing-announcement.html. If a home sells for $300,000, the client's $4500 payment is not "based on" the $3000 that he would have owed in the absence of the minimum. If the real-estate company later retroactively reduced the default listing fee to ½% of the final sales price, without changing the minimum, nobody would consider the client to be eligible for a rebate.

C. The Commission's Policy Statement Implementing Section 3582(c)(2) Cannot Allow Petitioners To Satisfy The Requirements Of The Statute

Petitioners invoke (Br. 25-34) the Commission's policy statement on Section 3582(c)(2), Sentencing Guidelines § 1B1.10, to argue that they are eligible for sentence reductions. But as the courts below correctly explained, the policy statement does not change the fact that petitioners' sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see J.A. 51-56, 70-91. Moreover, neither Section 3582(c)(2) nor Section 3553(e)—nor 28 U.S.C. 994(n), which petitioners also invoke (Br. 31-32)—empowers the Commission to authorize reduction of a sentence below a statutory minimum for reasons unrelated to substantial assistance.

1. Section 3582(c)(2) authorizes a sentence reduction for a defendant "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." See *Dillon*, 560 U.S. at 824-825 (citation omitted). The "relevant policy statement," which is binding on district courts, is found in Sentencing Guidelines § 1B1.10. *Dillon*, 560 U.S. at 821; see *id.* at 819.

As the statutory text makes clear, the Commission's role in sentence reductions under Section 3582(c)(2) is important, but circumscribed. The Commission has authority to decide whether to retroactively "lower[]" an amendable "sentencing range"; it has authority, through "policy statements," to limit sentence-reduction eligibility to only a subset of the defendants whose sentences

were "based on" that range; and it has authority, through "policy statements," to limit the permissible extent of any reduction for which a defendant is eligible. 18 U.S.C. 3582(c)(2); see *Dillon*, 560 U.S. at 826; see also 28 U.S.C. 994(u) (requiring guideline amendments to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced"); *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (noting that 28 U.S.C. 994(u) is implemented by Sentencing Guidelines § 1B1.10). The Commission does not, however, have the authority to decide whether a defendant's sentence was "based on" the "sentencing range" that it has lowered. 18 U.S.C. 3582(c)(2).

2. Because the statutory inquiry into whether a defendant's sentence was "based on" a lowered range turns on a question of historical fact, nothing in Sentencing Guidelines § 1B1.10 could render defendants like petitioners eligible for sentence reductions. Although the current version of Section 1B1.10 makes clear that such defendants should be eligible for reductions from the Commission's perspective, the statutory eligibility requirements remain preclusive. Cf. Sentencing Guidelines § 1B1.10(a) (recognizing that reductions are available only "as provided by 18 U.S.C. § 3582(c)(2)"). And to the extent the Commission's directives conflict with those of Congress, the policy statement "must give way." *United States* v. *LaBonte*, 520 U.S. 751, 757 (1997).

Under Section 1B1.10's general approach, a court "determining whether, and to what extent, a reduction * * * is warranted" should compute an "amended guideline range" under which the retroactive guidelines are substituted for the original ones. Sentencing Guidelines § 1B1.10(b)(1). If the "amended guideline range" is

lower than the original one, the court has discretion to reduce the defendant's sentence to any level at or above the bottom of the amended range. *Id.* § 1B1.10(b)(2)(A). A reduction is "not authorized" if a guidelines amendment "does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment)." *Id.* § 1B1.10, comment. (n.1(A)).

A modified approach applies to cases in which a defendant's original sentence was below the original guidelines range by virtue of a substantial-assistance departure. See Sentencing Guidelines § 1B1.10(b)(2)(B). In such a case, a court has discretion to reduce the defendant's sentence even below the bottom of the amended range, so long as the reduced sentence is proportionately no further below the amended range than the original sentence was below the original range. See *ibid.*

That modified approach is unproblematic so long as no statutory minimum is involved. Take the case, for example, of a defendant with an original range of 24-30 months and an amended range of 18-24 months, but who received a substantial-assistance departure under Section 5K1.1 that resulted in a 12-month sentence (50% of the bottom of the original range). Under Section 1B1.10, he could receive a reduction to as low as nine months (50% of the bottom of the amended range). The presence of a statutory minimum, however, complicates the inquiry, and the Commission adopted an amendment in 2014 to respond to difficulties encountered by courts of appeals confronting that situation. See Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014).

The new provision, Sentencing Guidelines § 1B1.10(c), states that in cases involving Section 3553(e) motions,

the "amended guidelines range shall be determined without regard to the operation of § 5G1.1." Thus, in such cases, calculation of the "amended guidelines range" disregards the normal step in which "a statutorily required minimum sentence" higher than the otherwise-applicable guidelines calculation becomes "the guideline sentence." *Id.* § 5G1.1(b). Accordingly, the "amended guidelines range" under Section 1B1.10(c) in petitioners' cases would be the amended versions of the guidelines calculations that, at their sentencings, were superseded by the statutory minimums. The Commission apparently believed—as did the government, which supported the new subsection—that Section 1B1.10(c) would make defendants like petitioners eligible for sentence reductions under 18 U.S.C. 3582(c)(2). See *id.* App. C Supp., Amend. 780 (Nov. 1, 2014); Gov't C.A. Br. 6-27.

That belief was incorrect. Although Section 1B1.10(c) removes the policy statement *itself* as an obstacle to a sentence reduction, it neither does nor could alter the "sentencing range" that a particular defendant's sentence was "based on" as a historical or statutory matter. See *Neal*, 516 U.S. at 290. Notwithstanding Section 1B1.10(c)'s instruction about how to compute the "amended guideline range" in a *sentence-reduction* proceeding, it remains the case that petitioners' *original* sentencing proceedings were subject to the statutory minimums in 21 U.S.C. 841(b)(1) and to Section 5G1.1(b)'s mandate that the "guideline sentence" (and thus the "sentencing range") be set at the statutory minimum. See Part A, *supra*. And notwithstanding that Section 1B1.10 effectively disregards the statutory minimum in sentence-reduction proceedings, the statutory minimum—not the superseded guidelines

calculation—was the starting point for the substantial-assistance departures in petitioners' original sentencing proceedings. See Part B, *supra*.

3. An additional barrier to petitioners' reliance on Section 1B1.10(c) is that nothing in Section 3582(c)(2) or Section 3553(e) allows the Commission to authorize a further reduction of their below-statutory-minimum sentences.

Petitioners do not contend that the Commission could instruct courts considering sentence reductions under Section 3582(c)(2) to disregard statutory minimums in cases that do *not* involve substantial-assistance departures under Section 3553(e). See *Neal*, 516 U.S. at 294 (reasoning that even if the Commission had intended to alter the applicability of a statutory minimum to a defendant, his Section 3582(c)(2) motion "still would not prevail"). Were the Commission empowered to do that, it could circumvent the statutory minimum for any class of defendants through manipulation of the Guidelines. See J.A. 80 (providing example).

Thus, any authority the Commission might have to allow for below-statutory-minimum reductions in cases like petitioners' must come from Section 3553(e). But Section 3553(e) confers no such authority. Although Section 3553(e) authorizes a government-sponsored substantial-assistance departure below a statutory minimum, it does not empower the Commission to authorize a postjudgment sentence reduction to a level below the statutory minimum for reasons unrelated to substantial assistance.

To the extent petitioners' contrary view relies on Section 3553(e)'s requirement that a substantial-assistance departure be "in accordance with the guidelines and policy statements issued by the Sentencing Commission" (or Section 994(n)'s instruction to promulgate

such guidelines and policy statements), Pet. Br. 23 (emphasis omitted), that reliance is misplaced. That proviso gives the Commission authority to constrain substantial-assistance departures when they are available, not to make below-minimum sentences available in circumstances that Congress has not authorized. See *Melendez*, 518 U.S. at 129-130.

D. Sentence Reductions For Petitioners Would Subvert The Function Of Section 3582(c)(2) By Increasing Sentencing Disparities

Allowing petitioners' sentences to be reduced even further below the statutory minimum would produce the precise types of "unwarranted disparities," *Freeman*, 564 U.S. at 525 (plurality opinion), that Section 3582(c)(2) exists to eliminate. Among other things, petitioners' approach would anomalously make them better off for having been sentenced before, rather than after, Amendment 782 was promulgated.

1. Section 3582(c)(2) "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon*, 560 U.S. at 828. The prospect of a sentence reduction thus protects against the "inequality" that would result if defendants whose sentences "depend on frameworks" the Sentencing Commission retroactively rejected are forced to "linger in prison" longer than similarly situated defendants sentenced today. *Freeman*, 564 U.S. at 525-526 (plurality opinion).

Sentence reductions for petitioners would create, rather than decrease, timing-based sentencing disparities. As the district court expressly recognized with respect to petitioner Feauto (J.A. 89), each petitioner would "receive the identical sentence" to the one he has

now if sentenced for the first time today, after Amendment 782. Although the amendment would result in an even lower prefatory guidelines calculation, that calculation would still be superseded by the statutory minimum. See Sentencing Guidelines §§ 1B1.1(a)(7), 5G1.1(b); see also, *e.g.*, *Dorsey*, 567 U.S. at 266-267 (statutory minimums supersede lower initial guidelines ranges). And the substantial-assistance departure would still be calculated from that statutory minimum. See Part B.1, *supra*.

What petitioners seek, therefore, is the potential for unwarranted relief. They are, in effect, trying to leverage the happenstance of their pre-Amendment 782 sentencings to obtain sentences that use the drug guidelines, rather than their statutory minimums, as the starting point for their substantial-assistance departures. The following table illustrates, as an example, the situation for petitioner Koons, as compared to an identical defendant sentenced today:

Table 2: Sentence Disparities Under Petitioners' Approach

	Guidelines Calculation Without Mandatory Minimum	**Statutory Minimum**	**Substantial Assistance Departure**	**Sentence**
Koons As Sentenced In 2010	151-188 months	240 months	25%	180 months
Identical Defendant Sentenced Today	121-151 months	240 months	25%	180 months
Koons' Requested Sentence	121-151 months	240 months	25%	As low as 91 months

Nothing would justify those disparities.

Nor would anything justify the disparities that petitioners' approach would create between them and defendants who were sentenced at the same time for identical offenses but who did not provide substantial assistance. See J.A. 88-89. Even under petitioners' approach, that latter class of defendants (whose cases did not involve a Section 3553(e) motion) would not be eligible for sentence reductions under Section 3582(c)(2). But the only difference between those defendants and petitioners—that petitioners provided substantial assistance to law enforcement—is irrelevant to Amendment 782. That amendment exists to "ameliorate the harshness of the drug guidelines, not to reward cooperators twice." J.A. 89; see Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). Lowering the sentences only of cooperators would thus be a nonsensical way to apply the amendment.

2. Petitioners err in suggesting (Br. 38-42) that finding them ineligible for sentence reductions would itself result in unwarranted disparities. Their ineligibility is a consequence of the statutory minimum sentences for the offenses to which they pleaded guilty. Even if petitioners view themselves, by virtue of their superseded guidelines calculations, as less deserving of punishment than offenders whose sentences are likewise dictated by those same statutory minimums, but whose prefatory guidelines calculations were higher, see Br. 35-43, Congress did not.

As petitioners note, a defendant sentenced before Amendment 782 whose drug-guidelines calculation *exceeded* the statutory minimum could potentially be eligible for a sentence reduction under Section 3582(c)(2).

That result is both sensible and consistent with the statutory scheme. Such a defendant's above-minimum range was the initial starting point for that defendant's substantial-assistance departure under Section 5K1.1 and Section 3553(e), and the defendant's sentence was thus "based on" that above-statutory-minimum range.

And such a defendant could not receive any unjustified relief under Section 3582(c)(2), even if he originally received a sentence below the statutory minimum. Consider, for example, a defendant whose guidelines calculation of 135 to 168 months exceeded a statutory minimum of 120 months and who received a 25% departure from the low end of the range, resulting in a below-minimum sentence of 101 months. Cf. Sentencing Guidelines § 1B1.10, comment. (n.4) (describing "Defendant A"). After Amendment 782, the initial guidelines calculation, before accounting for any statutory minimum, would be 108 to 135 months. See *ibid.* But notwithstanding Sentencing Guidelines § 1B1.10(c), a court in a sentence-reduction proceeding could not disregard the 120-month minimum. See Part C.3, *supra*. The government's Section 3553(e) motion did not authorize any departure below the minimum beyond what was justified by the defendant's substantial assistance as determined at the time he was sentenced. Thus, the lowest possible sentence the defendant could receive after the reduction would be 90 months: the 120-month minimum, with a 25% departure for substantial assistance.

If the district court were to exercise its discretion to reduce the sentence to 90 months, that would presumably be because that is the sentence that the court would have imposed if the sentencing had taken place after Amendment 782. And it is the same sentence that a defendant who provided an identical degree of substantial

assistance, but whose drug-guidelines calculation was below the statutory minimum, would receive either before or after Amendment 782. Cf. J.A. 197-198. The ultimate effect of the reduction, therefore, would be to eliminate the effect of the drug guidelines that the Commission has retroactively lowered—the precise result at which Section 3582(c)(2) is aimed.

Petitioners, however, seek a different result that cannot be squared with the function of Section 3582(c)(2). Sentence reductions for them would not eliminate the effect of the drug guidelines, because those guidelines had no effect on their sentences. Such reductions would simply be a windfall—one that the relevant statutes should not be construed to allow.*

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* Petitioner Putensen is ineligible for a sentence reduction for the additional reason that he accepted a presidential commutation of his sentence. See J.A. 49-50. Because the President's exercise of the commutation power creates a new, "substituted punishment" that replaces the original sentence, *Biddle* v. *Perovich*, 274 U.S. 480, 486, 487 (1927), his current term is not "based on" any Commission-modifiable "sentencing range," 18 U.S.C. 3582(c)(2). And a federal court may not, in any event, interfere with the President's "plenary authority * * * to reduce a penalty in terms of a specified number of years," *Schick* v. *Reed*, 419 U.S. 256, 266 (1974), by changing the sentence reduction he has directed, cf. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147, 148 (1872); *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1856).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3553 provides in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * * *

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has

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[1] So in original. The period probably should be a semicolon.

been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

2. 18 U.S.C. 3582 provides:

Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director

of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

3. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

* * * * *

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of

title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * * * *

4. 21 U.S.C. 846 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. 28 U.S.C. 994 provides in pertinent part:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of

supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11)[1] of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

---

[1] See References in Text note below.

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

* * * * *

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

* * * * *

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall,

at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

* * * * *

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

* * * * *

6. United States Sentencing Guidelines § 1B1.1 provides:

Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* § 1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(6) Determine the defendant's criminal history category as specified in Part A of Chapter

Four. Determine from Part B of Chapter Four any other applicable adjustments.

(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

7. United States Sentencing Guidelines § 1B1.10 provides:

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) AUTHORITY.—

(1) IN GENERAL.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result

of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) EXCLUSIONS.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) LIMITATION.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had

been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than

the term of imprisonment the defendant has already served.

(c) CASES INVOLVING MANDATORY MINIMUM SENTENCES AND SUBSTANTIAL ASSISTANCE.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) COVERED AMENDMENTS.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) SPECIAL INSTRUCTION.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

8. United States Sentencing Guidelines § 5G1.1 provides:

Sentencing on a Single Count of Conviction

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

9. United States Sentencing Guidelines § 5K1.1 provides:

Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

No. 17-5716

IN THE

Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. Petitioners' sentences were "based on" sentencing ranges the Commission has lowered because Section 3553(e) freed the district court from any requirement to impose sentences in accordance with statutory minimums 3

A. Petitioners' sentences were "based on" their U.S.S.G. § 2D1.1 ranges 3

B. It does not matter that the district court in this case tethered petitioners' sentences to the inapplicable statutory minimums 13

II. Even if Section 3553(e) requires courts to tether sentences to statutory minimums, petitioners' sentences were still "based on" their U.S.S.G. § 2D1.1 sentencing ranges 16

III. The structure and purposes of the Sentencing Reform Act confirm that petitioners are entitled to seek sentence reductions 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998).....8

Baldwin v. Reese,
541 U.S. 27 (2004).....21

Bhd. of R. Trainmen v. Balt. & Ohio R. Co.,
331 U.S. 519 (1947).....6

Dillon v. United States,
560 U.S. 817 (2010).....19

Dorsey v. United States,
567 U.S. 260 (2012).....3, 7, 10, 13

Duehay v. Thompson,
223 F. 305 (9th Cir. 1915).....21

Freeman v. United States,
564 U.S. 522 (2011).....14, 16, 17, 21

Gutierrez v. Ada,
528 U.S. 250 (2000).....8

Johnson v. United States,
559 U.S. 133 (2010).....8

Melendez v. United States,
518 U.S. 120 (1996)..... *passim*

In re Ross,
140 U.S. 453 (1891).....21

In re Sealed Case,
722 F.3d 361 (D.C. Cir. 2013).....10

United States v. Benz,
282 U.S. 304 (1931).....21

United States v. Booker,
543 U.S. 220 (2005).....10

United States v. Calle,
796 F. Supp. 853 (D. Md. 1992).....6
United States v. Fausto,
484 U.S. 439 (1988).....8
United States v. Granderson,
511 U.S. 39 (1994).....22
United States v. Joiner,
727 F.3d 601 (6th Cir. 2013).....11
United States v. LaBonte,
520 U.S. 751 (1997).....18, 19
United States v. Parral-Dominguez,
794 F.3d 440 (4th Cir. 2015).....17
United States v. Phillips,
382 F.3d 489 (5th Cir. 2004).....7
United States v. Stewart,
306 F.3d 295 (6th Cir. 2002).....11
United States v. Williams,
808 F.3d 253 (4th Cir. 2015).....12
United States v. Wills,
35 F.3d 1192 (7th Cir. 1994).....10
United States v. Wren,
706 F.3d 861 (7th Cir. 2013).....19, 20

Statutes

18 U.S.C. § 3553(a)(2) 12
18 U.S.C. § 3553(a)(4) 3
18 U.S.C. § 3553(e) ..... *passim*
18 U.S.C. § 3553(f).....7, 8
18 U.S.C. § 3582(c) 1
18 U.S.C. § 3582(c)(2)..... *passim*
28 U.S.C. § 994(h).....18
28 U.S.C. § 994(n).....9

28 U.S.C. § 994(u) 18, 19
Federal Sentencing Guidelines Manual
U.S.S.G. app. C, amend. 570 15
U.S.S.G. app. C, amend. 759 20
U.S.S.G. app. C, amend. 780 20
U.S.S.G. app. C, amend. 782 ..... 2, 15, 18, 20
U.S.S.G. § 1B1.10 18
U.S.S.G. § 1B1.10(b)(1) 19
U.S.S.G. § 1B1.10(c) 11, 15 21
U.S.S.G § 1B1.10(d) 16
U.S.S.G. § 2D1.1 ..... *passim*
U.S.S.G. § 2D1.1 cmt. n.24 15
U.S.S.G. § 5G1.1 ..... 15, 19, 21
U.S.S.G. § 5G1.1(b) ..... *passim*
U.S.S.G. § 5K1.1 ..... 5, 15
U.S.S.G. § 5K1.1 cmt. n.1 15

Rules and Regulations

Fed. R. Crim. P. 35(b) 6

Legislative Material

Message from the President of the United States Transmitting the Drug Free America Act of 1986, H.R Doc. 99-266 9

Other Authorities

Public Hearings on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 13, 2014) 17

U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014 (Mar. 6, 2014) 1, 11

REPLY BRIEF FOR PETITIONERS

A few years ago, the United States Sentencing Commission sought input on how to handle "proceedings under 18 U.S.C. § 3582(c) when the defendant was convicted of an offense carrying a mandatory minimum sentence but nonetheless received a sentence below the mandatory minimum at the original sentencing after providing substantial assistance to the government." U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 3 (Mar. 6, 2014).[1] "[F]or proportionality reasons and to properly account for substantial assistance," the Department of Justice urged the Commission "to permit a reduction from the applicable guideline range without regard to any mandatory minimum." *Id.* at 4.

The Department maintained that this solution not only "makes good sense as a policy," but also comports with relevant federal statutes. *Id.* at 3. "The correct application of sentencing law," the Department explained, "requires a district court that has granted a § 3553(e) motion for a reduced sentence to consider the properly calculated § 2D1.1 range when determining the appropriate sentence." *Id.* at 4. Furthermore, "under § 3553(e), those defendants are not subject to any mandatory minimum, regardless of . . . [what] the Guidelines Manual" might have indicated at the time of the original sentencing. *Id.*

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[1] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

The Government now argues that the very Guidelines amendments it advocated—and the Commission adopted—are unlawful. The Government says that when crafting a sentence in the situation here, 18 U.S.C. § 3553(e) requires a district court to "disregard[]" the § 2D1.1 range because that range can "play[] no role" in determining an appropriate sentence after granting a substantial assistance motion. U.S. Br. 44, 48. Moreover, according to the Government, all defendants in this situation remain "subject to [the] statutory minimum." *Id.* 28.

The Government was right the first time. Defendants in petitioners' situation are eligible under Section 3582(c)(2) for sentence reductions because—as the D.C. Circuit has held, and district courts across the country recognize as a matter of practice—the federal sentencing law required courts in the situation here to consider defendants' U.S.S.G. § 2D1.1 ranges as part of their sentencing calculus. Even if the Government were correct that petitioners' original sentences had to be anchored to the statutory minimums that their substantial assistance rendered inapplicable, it would not matter. That anchoring would have been a function of U.S.S.G. § 5G1.1(b)—not Section 3553(e)—and Amendment 782's retroactivity package makes clear that § 5G1.1(b) plays no role in calculating *amended* sentencing ranges. At the very least, petitioners' sentences were "based on" their guidelines ranges because those ranges necessarily informed how far downward to depart from the statutory minimums.

The structure and objectives of the Sentencing Reform Act confirm that defendants in petitioners' position should be eligible for sentence reductions. Not only did the Government take this view until its recent flip, but the Sentencing Commission's independent

judgment that defendants such as petitioners are eligible for resentencing warrants this Court's respect. This is especially so because allowing sentence modifications here is necessary to avoid creating unwarranted sentencing disparities. The Government's newfound position, by contrast, would give rise to serious inequities. That is exactly what the Sentencing Reform Act "seek[s] to combat." *Dorsey v. United States*, 567 U.S. 260, 277 (2012).

I. Petitioners' sentences were "based on" sentencing ranges the Commission has lowered because Section 3553(e) freed the district court from any requirement to impose sentences in accordance with statutory minimums.

A. Petitioners' sentences were "based on" their U.S.S.G. § 2D1.1 ranges.

The Government does not dispute that district courts must calculate guidelines ranges for all cooperators "that correspond[] to [their] offense level[s] and criminal history categor[ies]." U.S. Br. 23 (citation omitted); *see also* 18 U.S.C. § 3553(a)(4) (courts "shall consider" "the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ."). But the Government contends that where a cooperating defendant is subject to a statutory minimum sentence, his sentence cannot be "based on" that range because district courts must "disregard[]" the ranges in favor of the statutory minimum. U.S. Br. 44. Put another way, the Government argues that cooperators' U.S.S.G. § 2D1.1 ranges cannot be "sentencing ranges" under 18 U.S.C. § 3582(c)(2) because such ranges "must . . . be 'consistent with all

pertinent provisions' of federal criminal law," and statutory minimums trump guidelines ranges that recommend lower sentences. U.S. Br. 22, 24-25 (citation omitted).

Whatever the merits of this argument in the mine-run of cases, it fails to account for the effect of 18 U.S.C. § 3553(e) here. When a district court grants a motion under Section 3553(e) for a reduced sentence that reflects the defendant's substantial assistance, the court is freed from any obligation to anchor its sentence to a mandatory minimum, thereby restoring the relevance of the guidelines sentencing range. This conclusion flows from the statute's text, along with every other interpretive touchstone.

1. *Text.* The Government contends that "[t]he plain language" of Section 3553(e) "anchors any resulting sentence to the 'level established by statute as a minimum sentence.'" U.S. Br. 29 (citation omitted). But the text of Section 3553(e) says no such thing: It instructs, instead, that when the district court grants a substantial assistance motion, "[s]uch sentence shall be imposed in accordance with *the guidelines and policy statements* issued by the Sentencing Commission." 18 U.S.C. § 3553(e) (emphasis added). As the Government itself explained in *Melendez v. United States*, "That language means . . . that, in cases in which the government seeks a sentence below a statutory minimum, the Commission's guidelines and policy statements govern the court's exercise of discretion in imposing such a reduced sentence." Br. of United States at 19-20, *Melendez v. United States*, 518 U.S. 120 (1996) ("U.S. *Melendez* Br.").

Faced with this statutory language, the Government disregards its position in *Melendez* and

tries to limit the language's scope. According to the Government now, Section 3553(e)'s instruction to impose a sentence "in accordance with the guidelines" refers only to the factors in U.S.S.G. § 5K1.1 for crafting a departure based on a defendant's assistance—instead of the Guidelines as a whole. *See* U.S. Br. 25, 32, 35. Thus, the Government now continues, a court that grants a Section 3553(e) motion must still treat the otherwise applicable mandatory minimum as the presumptive sentence—instead of starting with the applicable guidelines range and then departing, as appropriate, based on the U.S.S.G. § 5K1.1 factors.

This reading of Section 3553(e) is untenable. As the *Melendez* Court emphasized, Section 3553(e) "states that the '*sentence*' shall be imposed in accordance with the Guidelines and policy statements, not that the '*departure*' shall occur, or shall be authorized, in accordance with the Guidelines and policy statements." *Melendez*, 518 U.S. at 129 n.9 (emphasis added). Consequently, nothing in Section 3553(e)'s text precludes a court that grants a substantial assistance motion from considering *all* of the relevant guidelines (including the § 2D1.1 range), not just those designed to aid in evaluating a defendant's cooperation. *See Melendez*, 518 U.S. at 129-30; NACDL Br. 10-11.

Neither of the Government's other textual arguments fares any better. The Government asserts that Section 3553(e)'s title—"Limited Authority to Impose a Sentence Below a Statutory Minimum"—forbids a court from considering non-assistance-related guidelines in crafting a sentence. U.S. Br. 29-30, 33. This Court, however, has long followed "the wise rule that the title of a statute and the heading of

a section cannot limit the plain meaning of the text." *Bhd. of R. Trainmen v. Balt. & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947). At any rate, the phrase "limited authority" simply limits a court's authority to set aside a statutory minimum to the situation where the prosecution makes a substantial assistance motion. The phrase does not restrict the court, after granting such a motion, from considering the applicable guidelines range. *See United States v. Calle*, 796 F. Supp. 853, 860-61 (D. Md. 1992).

The Government also asserts that Section 3553(e)'s explanation that a district court may impose a sentence below an otherwise applicable statutory minimum "so as to *reflect* a defendant's substantial assistance" indicates that such a sentence must be anchored to the statutory minimum. U.S. Br. 32-33 (emphasis added) (quoting 18 U.S.C. § 3553(e)). But the word "reflect" cannot bear the weight the Government places upon it. The statute uses the phrase "so as to reflect" (in place of a more active phrase such as "if the court finds") simply because the prosecution, not the court, determines whether a defendant has provided substantial assistance. *See Melendez*, 518 U.S. at 125-26; *id.* at 133-34 (Breyer. J., concurring in part and dissenting in part). And as petitioners have explained, the word "reflect" means "to make apparent." Petr. Br. 33 (quoting and citing dictionaries). A sentence under Section 3553(e) thus "reflects" a defendant's substantial assistance simply by being lower than it otherwise would be. Petr. Br. 33 & n.11.[2]

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[2] For the same reasons, the Government's reliance on the word "reflect" in a now-superseded version of Federal Rule of Criminal Procedure 35(b), *see* U.S. Br. 34-35, is unavailing.

2. *Structure.* The Government next avers that a comparison between Section 3553(e) and 18 U.S.C. § 3553(f)—the "safety valve" provision—shows that the former "authorizes only an anchored departure from, not the complete elimination of, [a] statutory minimum." U.S. Br. 31. Both statutes, however, share equivalent operative language. Section 3553(e) instructs courts to impose sentences "in accordance with the guidelines." 18 U.S.C. § 3553(e). And Section 3553(f) says that "the court shall impose a sentence pursuant to [the] guidelines."

The Government focuses on the fact that Section 3553(f) also contains the phrase "without regard to any statutory minimum sentence." U.S. Br. 31. In the Government's view, the absence of that phrase in Section 3553(e) demonstrates that that provision does not permit courts to set aside statutory minimums. That assertion is incorrect. Section 3553(e) expressly authorizes courts to impose sentences "below a level established by statute as a minimum sentence." This language—just like the "without regard to" language in Section 3553(f)—allows defendants to "escape" otherwise applicable mandatory minimums, *Dorsey v. United States*, 567 U.S. 260, 285 (2012), and instead to receive sentences based on the Guidelines. *See also United States v. Phillips*, 382 F.3d 489, 499 (5th Cir. 2004) ("[A] district court may impose a sentence of imprisonment below a statutory minimum for a drug crime only if: (1) the Government makes a motion pursuant to 18 U.S.C. § 3553(e) asserting the defendant's substantial assistance to the Government; or (2) the defendant meets the 'safety valve' criteria set forth in 18 U.S.C. § 3553(f).").

In any event, the Government is wrong that the canon presuming that different words in different

provisions mean different things applies here. Although Section 3553(f) is the "very next provision" in the U.S. Code, U.S. Br. 31, it was enacted eight years after Section 3553(e). And while the Government asserts that differently worded provisions presumably mean different things even when "the two subsections were enacted at different times," the only case the Government cites for that proposition is *United States v. Fausto*, 484 U.S. 439 (1988). *See* U.S. Br. 31. That case, however, is inapposite. It involved the situation where two dueling statutes speak to the same issue, requiring the Court to try to "'make sense' [of them] in combination." *Fausto*, 484 U.S. at 453. In that special context, the Court strains to differentiate later-enacted laws from earlier-enacted ones to make both work as part of an "integrated statutory scheme." *Id.* at 452-53.

The situation here is different; subsection (e) and later-enacted subsection (f) do not work together or otherwise depend on each other. In this context, where the later-enacted law "'do[es] not seek to clarify an earlier enacted general term' and 'do[es] not depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute,'" the later law is "'*beside the point*' in reading the first enactment." *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) (emphasis added) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)); *accord Johnson v. United States*, 559 U.S. 133, 143 (2010). That is, in the circumstances here, the earlier statute (Section 3553(e)) must be construed on its own terms.

3. *Legislative history.* Nothing in Section 3553(e)'s legislative history suggests that Congress intended courts to anchor sentences under that provision to statutory minimums. The Government nevertheless

maintains that allowing courts to impose sentences under Section 3553(e) without regard to statutory minimums would frustrate the goal expressed in the President's message transmitting the proposed legislation to Congress. That goal, according to the Government, was to "obviate any need for prosecutors to . . . charg[e] 'a less serious offense'" as a means of rewarding cooperators. U.S. Br. 36-37 (quoting Message from the President of the United States Transmitting the Drug Free America Act of 1986, H.R Doc. 99-266, at 118 (1986 Message)).

If this was indeed the President's reason for proposing Section 3553(e), it is the Government's position—not petitioners'—that would thwart that objective. If the sentences of defendants who cooperate must be tied to statutory minimums, subject to reduction only according to the quality of their assistance, then prosecutors would still have an incentive to charge lesser offenses to truly free the defendants from statutory minimums. And that would make it less likely that defendants' crimes of conviction would "reflect accurately" their true conduct. U.S. Br. 37 (quoting 1986 Message at 118).

4. *Case law.* Unable to build an argument from first principles, the Government attempts to defend its new position by relying on case law. The Government points in particular to *Melendez*, where the Court described Section 3553(e) as related to Congress's edict to the Sentencing Commission in 28 U.S.C. § 994(n) to "constrain[] the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum." U.S. Br. 35 (quoting 518 U.S. at 129).

This quotation from *Melendez*, however, says nothing about anchoring sentences to a statutory

minimum that a defendant's substantial assistance renders inapplicable. Instead, the quotation simply notes, before *United States v. Booker*, 543 U.S. 220 (2005), when the Guidelines were binding, that sentences under Section 3553(e) had to be imposed in strict conformance with the Guidelines—like any other sentence not controlled by a statutory directive. *See also* U.S. *Melendez* Br. 20 (making same point). Insofar as this Court has spoken since to the methodology a court should use to craft a sentence after granting a Section 3553(e) motion, it has instructed that the court is "relieved of application of a mandatory minimum"—just as in the safety valve context. *Dorsey*, 567 U.S. at 285.

The Government also asserts that "every court of appeals to consider th[e] issue" has held that sentences under Section 3553(e) "must use the mandatory minimum as the starting point." U.S. Br. 29 (quotation marks and citation omitted). Not so. The D.C. Circuit (per Griffith, J., joined by Garland, C.J., and Rogers, J.), has held that "granting [a] § 3553(e) motion free[s] the district court to use the guideline range and disregard the mandatory minimum." *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013). Judge Easterbrook has likewise explained—in a dissent this Court vindicated in *Melendez*—that when a court grants a Section 3553(e) motion, it "remove[s] the barrier to the use of [a] guideline range" that lies below an otherwise binding statutory minimum. *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994); *see also* Petr. Br. 29-31 (citing other authority).

To be sure, other courts of appeals have issued opinions holding that Section 3553(e) requires sentences to be anchored to statutory minimums rendered inapplicable by defendants' substantial

assistance. *See* U.S. Br. 29 (citing cases).[3] But to state the obvious: this Court sits to resolve circuit splits and to set the law straight. Moreover, this Court need not worry that doing so here will create any kind of upheaval. As the National Association of Federal Defenders explains (and the Government does not dispute), sentencing courts across the country regularly use U.S.S.G. § 2D1.1 ranges as anchors or targets in crafting sentences under the circumstances here, even in districts where the practice is ostensibly prohibited. NAFD Br. 18-24. In fact, they commonly do so *at the Government's behest*. *See id.*; U.S. Br. 41.

5. *Consequences.* The Government's new reading of Section 3553(e) would also have unwelcome consequences. Indeed, for all of the Government's backtracking in this Court, it is noteworthy that nowhere in its brief does the Government disavow its earlier representation that "the correct policy is fairly clear": Defendants who provide substantial assistance to the Government should receive reduced sentences "without respect to any mandatory minimum." U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing

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[3] The Government overstates the number of courts that have so held. Some of the cases the Government cites treat the mandatory minimum as the starting point, as the Eighth Circuit did here, *as a function of U.S.S.G. § 5G1.1(b)*, not Section 3553(e). *See, e.g.*, *United States v. Joiner*, 727 F.3d 601, 609 (6th Cir. 2013) (applying precedent derived from *United States v. Stewart*, 306 F.3d 295, 332 (6th Cir. 2002), which held, due to "language in USSG § 5G1.1(b)," that the statutory minimum must be the starting point). As noted below, the Commission has now made clear that § 5G1.1(b) does not require (or even allow) such anchoring. *See* U.S.S.G. § 1B1.10(c); *infra* at 15-16.

Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 4 (Mar. 6, 2014).[4]

Making sentencing reductions available to cooperators such as petitioners would also further *congressional* objectives of "impos[ing] a sentence sufficient, but not greater than necessary . . . to reflect the seriousness of the offense," 18 U.S.C. § 3553(a)(2), and "rewarding cooperation with the authorities," *United States v. Williams*, 808 F.3d 253, 262 (4th Cir. 2015) (internal quotation marks and citation omitted). Mandatory minimums "disrupt th[e] carefully crafted and calibrated [guidelines] system by imposing one-size-fits-all punishments" that often overestimate defendants' culpability. FAMM Br. 8; *see also id.* at 9-20 (collecting authorities). Accordingly, as the Fourth Circuit has explained, Section 3553(e) is designed to

> moderate the rigorous inflexibility of mandatory sentences where the offender has rendered substantial assistance to the Government. The prospect of securing substantial-assistance motions from the prosecutors encourages defendants to aid in investigations and prosecutions of their coconspirators and criminal cohorts. That inducement is a powerful tool for more effective law enforcement[.]

Williams, 808 F.3d at 262 (internal quotation marks and citation omitted).

The only cost of that "powerful tool," under petitioners' construction of Section 3553(e), is that

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[4] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

cooperators are sentenced like everybody else. That is, cooperators have their sentences grounded first and foremost in the guidelines ranges corresponding to their offense levels and criminal history categories. And this trade-off is more than fair to the Government. Section 3553(e) gives the Government total control over whether a sentence below the minimum should be imposed. *See Melendez*, 518 U.S. at 125-30. If the Government indeed makes such a request, a court should be free—just as Section 3553(e) indicates—to impose a sentence consistent with *all* of the Guidelines, untethered to the inapplicable statutory minimum.

B. It does not matter that the district court in this case tethered petitioners' sentences to the inapplicable statutory minimums.

The Government next argues that whatever the proper construction of Section 3553(e) may be, petitioners' sentences cannot have been "based on" guidelines ranges because the district court in these cases never suggested it "was influenced by a calculation of the guidelines without regard to the applicable statutory minimums." U.S. Br. 41; *see also id.* at 43. This contention is unpersuasive.

1. A defendant's eligibility for a sentence reduction under Section 3582(c)(2) should not depend on whether the district court correctly applied Section 3553(e) or the Guidelines at the defendant's original sentencing. Any other rule would create unjustified—indeed, intolerable—sentencing disparities, adding insult to injury for defendants who were sentenced incorrectly in the first instance. *See Dorsey*, 567 U.S. at 279 (Court should avoid creating unjustified disparities through sentence modification proceedings); NACDL Br. 18-20.

Accordingly, as the Government itself posits elsewhere in its brief, "no need exists to examine each case to determine whether the sentencing court may have erroneously" applied the law at the original sentencing. U.S. Br. 46. All that matters is whether a district court properly applying the law at the defendant's original sentencing would have needed to consult a sentencing range that the Commission subsequently lowered. Petr. Br. 19; *see also Freeman v. United States*, 564 U.S. 522 (2011). Insofar as the range "was a relevant part of the analytic framework," *Freeman*, 564 U.S. at 530 (plurality opinion), that the judge should have used to determine the sentence, the defendant is eligible for a sentence modification.

For all the reasons explained above in Part I.A, such is the case here. Indeed, even if the Government were correct that the amended sentencing range must have been "a foundational part" of the original sentencing, U.S. Br. 44 (citation omitted), the result here would be the same. Under the plain text of Section 3553(e), the district court should have used petitioners' U.S.S.G. § 2D1.1 ranges as the foundations for their calculations—or at least should have used the ranges as targets for their sentences. *See supra* at 4-6.

Nothing in U.S.S.G. § 5G1.1(b) is to the contrary. As petitioners have explained, that provision applies only when there is a "statutorily *required* minimum sentence." And the whole point of granting a motion under Section 3553(e) is that once a substantial assistance motion has been granted, there is no longer a "required" minimum sentence. Petr. Br. 25-26; *see also* NACDL Br. 5.

The Government's only response is that a comment in the Guidelines "describes a Section 3553(e) motion as an event that 'may justify a sentence *below a statutorily required minimum sentence*'"—a description the Government maintains "cannot be squared with" treating U.S.S.G. § 5G1.1(b) as inapplicable here. U.S. Br. 27 (quoting U.S.S.G. § 5K1.1 cmt. n.1). That comment just explains that granting a Section 3553(e) motion may justify a sentence below the otherwise binding statutory minimum; it does not say the resulting sentence must be *anchored* to that minimum. As to the anchoring question, the text of § 5K1.1 says that "the court may depart *from the guidelines*." U.S.S.G. § 5K1.1 (emphasis added). Furthermore, another comment in the Guidelines, which the Government ignores, confirms that a substantial assistance motion "waive[s]" an otherwise binding statutory minimum. U.S.S.G. § 2D1.1 cmt. n.24; *see also* U.S.S.G. app. C, amend. 570, reason for amend. (Supp. 2016) (A defendant "who is the beneficiary of a Government substantial assistance motion under 18 U.S.C. § 3553(e)[] is not subject to any statutory minimum term of supervised release.").

2. Even if U.S.S.G. § 5G1.1(b) required the district court to use statutory minimums as the starting points for crafting petitioners' sentences, petitioners are still eligible for relief. The Government acknowledges that such starting points—assuming for the moment they were correct—qualified as "sentencing ranges" under Section 3582(c)(2). U.S. Br. 23-24. And the Sentencing Commission subsequently made clear in Amendment 782's retroactivity package that such amended ranges "shall be determined without regard to the operation of § 5G1.1." U.S.S.G § 1B1.10(c); *see also* U.S.S.G

§ 1B1.10(d). Accordingly, there can be no doubt that whatever the proper sentencing range may have been at the time of petitioners' sentencings, the range "has subsequently been lowered by the Sentencing Commission," just as Section 3582(c)(2) requires. *See* Petr. Br. 26-27.

II. Even if Section 3553(e) requires courts to tether sentences to statutory minimums, petitioners' sentences were still "based on" their U.S.S.G. § 2D1.1 sentencing ranges.

Petitioners explained in their opening brief that even if the Government were correct that Section 3553(e) requires sentences to be anchored to statutory minimums, petitioners' sentences were still "based on" their U.S.S.G. § 2D1.1 sentencing ranges because such ranges at the very least are relevant to how far downward a court should depart within "the outer limit" allowed by the nature and extent of a defendant's assistance. Petr. Br. 33-34 (citation omitted). The Government grudgingly admits that Section 3553(e) "potentially" leaves district courts at least this residual power to consider defendants' U.S.S.G. § 2D1.1 ranges. U.S. Br. 39. And Section 3582(c)(2) "permit[s] the district court to revisit a prior sentence *to whatever extent* the sentencing range in question" was relevant at the original sentencing. *Freeman v. United States*, 564 U.S. 522, 530 (2011) (plurality opinion) (emphasis added). The Government nevertheless says the authority to consider a U.S.S.G. § 2D1.1 range to limit the extent of a downward departure does not satisfy Section 3582(c)(2)'s "based upon" requirement because such consideration "is the functional equivalent of varying upward from the statutory minimum before granting an award for substantial assistance." U.S. Br. 40.

This is a puzzling contention. Regardless of whether a defendant's U.S.S.G. § 2D1.1 range is used to "vary[] upward" from a statutory minimum or to limit a downward departure, the range is inescapably "a relevant part of the analytic framework the judge use[s] to determine the sentence," *Freeman*, 564 U.S. at 530 (plurality opinion). The § 2D1.1 range under these circumstances is likewise part of the "foundation for the term of imprisonment," *id.* at 535 (Sotomayor, J., concurring in the judgment). This reality is especially apparent where, as here, defendants' sentences ultimately fell within their § 2D1.1 ranges, indicating that the district court had those ranges "in his or her mind" when crafting the sentences. Petr. Br. 23 (quoting *Public Hearings on Proposed Amendments to the Federal Sentencing Guidelines* 255 (Mar. 13, 2014) (statement of Robert Zauzmer, on behalf of U.S. Dep't of Justice)); *see also United States v. Parral-Dominguez*, 794 F.3d 440, 448 & n.9 (4th Cir. 2015) (collecting sources describing the "psychological presumption" that guidelines ranges create).

If for no other reason than this, the decision below must be reversed. A defendant is eligible under Section 3582(c)(2) for a sentence reduction if he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Even under the Government's view of federal sentencing law, deviations in this setting from statutory minimums are influenced in part by the U.S.S.G. § 2D1.1 ranges that the Sentencing Commission has now lowered.

III. The structure and purposes of the Sentencing Reform Act confirm that petitioners are entitled to seek sentence reductions.

The Government acknowledges that "the current version of Section 1B1.10"—part of Amendment 782's retroactivity package—"makes clear that such defendants [as petitioners] should be eligible for reductions from the Commission's perspective." U.S. Br. 50. Yet the Government tells this Court to pay no heed to that perspective because "to the extent the Commission's directives conflict with those of Congress, [they] 'must give way.'" *Id.* (quoting *United States v. LaBonte*, 520 U.S. 751, 757 (1997)). This response misses the point. Congress itself has decreed that the Commission's informed views matter in assessing who should be eligible for sentence reductions under Section 3582(c)(2). And especially where, as here, the Commission deems a class of defendants eligible for sentence modifications to avoid unwarranted disparities, this Court should respect that determination.

1. This case is the polar opposite of *LaBonte*, the precedent the Government cites as grounds for disregarding the Commission's views. In that case, the Commission adopted an amendment that was "at odds with" the "plain language" of Congress's instructions to the Commission in 28 U.S.C. § 994(h). 520 U.S. at 757.

Here, by contrast, the Commission's promulgations flow directly from the neighboring directive in Section 994(u), which instructs: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall

specify in what circumstances . . . the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). Consequently, the Commission has acted within its "[b]road" "discretion," or "latitude," *LaBonte*, 520 U.S. at 757, 760, to implement Congress's instructions in a wise and effective manner. *See also Dillon v. United States*, 560 U.S. 817, 826 (2010). And because the Commission has not clearly transgressed any other limitation in the Sentencing Reform Act, this Court should respect this "preferred means" of determining which defendants are eligible for sentencing modifications under Section 3582(c)(2). Petr. Br. 38.

2. The Government agrees that the Court should avoid construing Section 3582(c)(2) to create new and unwarranted sentencing disparities. U.S. Br. 54. The Government's position, however, would do just that, while petitioners' would generate uniformity.

a. The Government contends that its position would not result in unwarranted disparities because "a court in a sentence-reduction proceeding" regarding a cooperator whose original § 2D1.1 range was *above* the statutory minimum but who received a sentence below the minimum "could not disregard the [statutory] minimum." U.S. Br. 57. This is incorrect. Under U.S.S.G. § 1B1.10(b)(1) (which the Government does not challenge), a court in a Section 3582(c)(2) proceeding must substitute the amended § 2D1.1 guideline range for the original one "and shall leave all other guideline application decisions unaffected." This command "means that the new [§ 2D1.1] range must *not* be reset to equal the presumptive statutory mi[n]imum." *United States v. Wren*, 706 F.3d 861, 864 (7th Cir. 2013) (emphasis added). In other words, "if § 5G1.1 did not affect the original calculation, it does

not come into play when a court considers the effect of a retroactive change to the Guidelines." *Id.* at 863. Accordingly, the Government's position would indeed create dramatic and unwarranted disparities between defendants whose original § 2D1.1 ranges were above the statutory minimum and those whose were below. *See* Petr. Br. 40-42.

b. No comparable problem arises under petitioners' approach. The Government asserts that petitioners' approach would create unjustified disparities "between them and defendants who were sentenced at the same time for identical offenses but who did not provide substantial assistance." U.S. Br. 56. "The guidelines and the relevant statutes," however, "have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar" are not. *See* U.S.S.G. app. C amend. 759 (Reason for Amendment). And the Commission explained as part of Amendment 782's retroactivity package that allowing cooperators such as petitioners to obtain sentence reductions "ensures that [such defendants] have the opportunity to receive the full benefit of a reduction that accounts for that assistance." *Id.* amend. 782 (Reason for Amendment).

The Government also maintains that petitioners' approach would allow defendants whose § 2D1.1 ranges were below the statutory minimum to obtain original "unwarranted relief" because, "if sentenced for the first time today," Sections 3553(e) and U.S.S.G. § 5G1.1(b) would require their substantial assistance departures to be "calculated from th[e] statutory minimum." U.S. Br. 55. But for the reasons explained

above, Section 3553(e) does not require such anchoring. *See supra* at 4-13. Nor does U.S.S.G. § 5G1.1(b), *see supra* at 14-15—a reality made all the more clear by the Sentencing Commission's recent clarification that courts should calculate amended ranges under the circumstances "without regard to the operation of § 5G1.1." U.S.S.G. § 1B1.10(c); *see also supra* at 15-16. In short, defendants today should be sentenced just as petitioners seek to have their sentences modified.

In any event, "[w]hat is at stake in this case is a defendant's eligibility for relief, not the extent of that relief." *Freeman*, 564 U.S. at 532 (plurality opinion). If a district court, based on its "continuing professional commitment . . . to a consistent sentencing policy," reasonably believes a Section 3582(c)(2) reduction should be limited or even denied to avoid a "windfall," it may act accordingly. *Id.* But there is no warrant for shutting the door entirely to the class of defendants at issue here.[5]

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[5] The Government argues that Putensen is ineligible for Section 3582(c)(2) relief "for the additional reason that he accepted a presidential commutation of his sentence" to 188 months in prison. *See* U.S. Br. 58 n.*. The Government, however, did not raise this argument in the Eighth Circuit or its Brief in Opposition. Particularly because of the argument's "complex nature" and "broad implications," this Court should deem the argument waived. *Baldwin v. Reese*, 541 U.S. 27, 34 (2004). At the very most, the issue should be left for remand. Contrary to the Government's contention, Putensen's commutation did not wipe out his original sentence; it merely amended it. *See United States v. Benz*, 282 U.S. 304, 311 (1931); *Duehay v. Thompson*, 223 F. 305, 307-08 (9th Cir. 1915). So he retains the right to finish litigating his pending appeal claiming that his sentence should be reduced to a term shorter than the commuted sentence. *See In re Ross*, 140 U.S. 453, 480 (1891).

3. Any lingering doubt as to the outcome here should be resolved in petitioners' favor. The Government does not dispute that, to the extent the federal sentencing law at issue here is ambiguous, the rule of lenity requires it to be construed against locking defendants into excessive sentences. *See* Petr. Br. 42-43. And, if nothing else, it should be beyond cavil that the Government's proposed constructions of Sections 3553(e) and 3582(c)(2) are not "unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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IN THE
Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether a defendant whose substantial assistance to the authorities resulted in a sentence imposed "in accordance with the guidelines," rather than dictated by an otherwise applicable mandatory minimum, is eligible for Section 3582(c)(2) relief when the Guidelines are amended to recommend even lower sentences—or whether, as the Eighth Circuit held, the Sentencing Commission is powerless to enable such relief on the ground that the defendant's original sentence was not "based on" the Guidelines at all, but rather on the statutory mandatory minimum that would have applied in the absence of his substantial assistance.

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

STATEMENT 2

ARGUMENT 3

I. Defendants Who Are Granted Relief from Mandatory Minimum Statutes Because of Their Substantial Assistance to the Government Are Eligible for Sentence Reductions Under Section 3582(c)(2). 3

II. Reading Section 3582(c)(2) in Favor of Applying Mandatory Minimums Runs Counter to Congressional Intent and Contributes to an Unjust Sentencing Policy. 7

A. Mandatory Minimums Interfere with the System of Guided, Flexible Discretion Established by the Sentencing Reform Act. 9

B. By Shifting the Power to Decide Sentences to Prosecutors, Mandatory Minimums are Inconsistent with Traditional Notions of Fairness. 12

C. Mandatory Minimums Are Largely Ineffective at Deterring Offenders, Reducing Crime, or Inducing Cooperation. 15

D. Mandatory Minimums Are Detrimental to Communities and How They View the Criminal Justice System. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Bordenkircher v. *Hayes*,
434 U.S. 357 (1978) 12

Dillon v. *United States*,
560 U.S. 817 (2010) 3

Dorsey v. *United States*,
567 U.S. 260 (2012) 5

Gall v. *United States*,
552 U.S. 38 (2007) 7

Peugh v. *United States*,
569 U.S. 530 (2013) 6, 7

Rita v. *United States*,
551 U.S. 338 (2007) 8

United States v. *Booker*,
543 U.S. 220 (2005) 7, 14

In re Sealed Case,
722 F.3d 361 (D.C. Cir. 2013) 4, 6

United States v. *Hungerford*,
465 F.3d 1113 (9th Cir. 2006) 12

United States v. Kupa,
976 F. Supp. 2d 417 (E.D.N.Y. 2013) 14

Statutes

18 U.S.C. § 3553(a) 14

18 U.S.C. § 3553(e) ..... *passim*

18 U.S.C. § 3553(f) 11

18 U.S.C. § 3582(c)(2) ..... *passim*

21 U.S.C. § 841(b) 12

21 U.S.C. § 851 12

28 U.S.C. § 994 8

Federal Sentencing Guidelines

U.S.S.G. § 1B1.7 6

U.S.S.G. § 2D1.1 5

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Reevaluating the Effectiveness of Mandatory Minimum Sentences: Hearing before the S. Comm. on the Judiciary, 113th Cong. 4 (2013) 13

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Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1 (2010) 15, 17

Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 Judicature 6 (2010) 19

Daniel S. Nagin, *Deterrence*, in *Reforming Criminal Justice Vol. 4: Punishment, Incarceration, and Release* 19 (Erik Luna ed., 2017) 16

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U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) 10, 14

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INTEREST OF AMICUS CURIAE[1]

Amicus Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM currently has more than 50,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings in important cases.

FAMM submits this brief cognizant of the toll mandatory minimums exact on its members in prison, their loved ones, and our communities. The court of appeals has embraced an interpretation of the interplay between 18 U.S.C. §§ 3553(e) and 3582(c)(2) that wrongly and unnecessarily subjects individual defendants to the damaging and failed system of mandatory minimums. In light of the grave harm wreaked by these sentences, FAMM is keenly interested in ensuring they be used sparingly and only when authorized by statute.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief.

Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* states that counsel for Petitioners and Respondent have both granted consent to the filing of this brief.

STATEMENT

Petitioners were convicted of drug crimes that ordinarily would have been subject to mandatory minimum sentences. But because each rendered substantial assistance in the Government's investigation and prosecution of others, the Government moved to free the sentencing judge from the constraints of the mandatory minimums. This permitted the judge to impose sentences by consulting the Guidelines established by the United States Sentencing Commission and exercising the guided discretion that ordinarily applies in federal sentencing.

The Commission subsequently lowered the Guidelines ranges that apply to the Petitioners' offenses and made those changes retroactive. A federal statute allows criminal defendants who have been sentenced to terms of imprisonment based on sentencing ranges that have been subsequently lowered to seek sentence modifications to reflect the Commission's better-informed judgment as to the range of recommended sentences. The question before the Court is whether the law nonetheless requires mandatory minimums—which were not imposed on the Petitioners—to continue to cast a shadow over their sentences, depriving Petitioners of even the possibility of benefiting from the Commission's periodic reassessment of proportional and just sentencing outcomes.

The answer is no. Mandatory minimums have no place in the substantial assistance and retroactivity provisions at issue here. To hold otherwise would be contrary to the clear intent of both provisions, and would frustrate the purposes of the Sentencing Reform Act and the system of guided discretion it established. Moreover, reading those provisions in

favor of applying mandatory minimums would perpetuate unjust, and unjustifiable, sentences, in direct contravention of the Commission's objectives.

The Government has already urged that Petitioners should be relieved from mandatory minimum sentencing, and the original sentencing court has already agreed. There is no sound basis for resurrecting the constraints of those mandatory minimums when the Commission determines that a reduced sentencing range should form the basis for a sentence reduction motion.

ARGUMENT

I. Defendants Who Are Granted Relief from Mandatory Minimum Statutes Because of Their Substantial Assistance to the Government Are Eligible for Sentence Reductions Under Section 3582(c)(2).

"[Section] 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon* v. *United States*, 560 U.S. 817, 828 (2010). That provision allows defendants who have already been sentenced to seek a sentence modification if they were originally "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

Petitioners and the Government agree that the Sentencing Commission validly exercised its authority to lower the sentencing ranges that correspond to the drug offenses for which Petitioners were convicted. They also agree that those amendments may be applied retroactively. The Government contends,

however—and the Eighth Circuit concurs—that Petitioners are not eligible for relief under Section 3582(c)(2) because their sentences were "based" *not* on subsequently lowered Guidelines ranges, but on statutory minimum terms of imprisonment.

While that is an accurate statement when the original sentence was restricted by a statutory minimum, it is not true here. In each of Petitioners' cases, the district court granted the Government's motion for relief under 18 U.S.C. § 3553(e) because each provided substantial assistance to the Government. That relief "freed the district court to . . . disregard the mandatory minimum," *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013), and impose a different sentence "in accordance with the guidelines and policy statements issued by the Sentencing Commission," 18 U.S.C. § 3553(e). In other words, when a sentencing court grants the Government's Section 3553(e) "substantial assistance" motion, an otherwise-applicable statutory minimum sentence drops out, and the defendant's sentence is necessarily "based on" the Guidelines, which the sentencing court is required to consult. The Eighth Circuit's holding to the contrary is inconsistent with the basic function of Section 3553(e), and would subject criminal defendants to disparate (and oftentimes unduly harsh) treatment based on the sentencing court's individual application of federal statutes and the Guidelines.

Congress has determined that in a limited category of cases a criminal defendant should not be subject to the statutory minimum term of imprisonment that would otherwise restrict a sentencing judge's discretion. In an effort to encourage and reward cooperation by defendants in government enforcement efforts, Congress provided that relief where the

defendant provides "substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e). In that case, the sentencing court, "upon motion of the Government, . . . shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance." *Id.* The sentence imposed in lieu of the statutory minimum must be "imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." *Id.*

As both this Court and the Sentencing Commission have long recognized, the basic function of Section 3553(e) is to relieve a sentencing court of the obligation to impose the statutory minimum. "[A]n offender may escape a minimum by providing substantial assistance in the investigation or prosecution of another person." *Dorsey* v. *United States*, 567 U.S. 260, 285 (2012). In the words of the Commission's commentary, "[w]here a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be 'waived' and a lower sentence imposed . . . by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.'" U.S.S.G. § 2D1.1, cmt. n. 24; *see also* U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 59 (1991) (hereinafter "U.S.S.C. 1991 Report"), referenced in H.R. Rep. No. 103-460, at 4 (1994) ("[A] substantial assistance motion granted by the court *removes* the mandatory minimum requirements that would otherwise be binding at sentencing." (emphasis added)). The mandatory minimum provision having been "waived," the sentencing court is free to impose a sentence other than the statutory minimum.

Not long ago, the D.C. Circuit recognized the inherent logic of this proposition in a case presenting the same question now before this Court. *In re Sealed Case*, 722 F.3d at 363, 366. There, the court noted that a sentencing court's decision to grant a Section 3553(e) motion "'waive[s]' the statutory minimum and permit[s] the district court to impose a lower sentence based on the [defendant's] applicable guidelines range." *Id.* at 368. In other words, "[b]ecause of the government's substantial assistance motion, *no mandatory minimum [is] at work* when the district court sentence[s] the [defendant]." *Id.* (emphasis added).

Once a sentencing court is "freed" of any obligation to impose a statutory minimum, *In re Sealed Case*, 722 F.3d at 366, its discretion to impose a new sentence is not unlimited. The new sentence must be imposed "in accordance with the guidelines and policy statements issued by the Sentencing Commission," 18 U.S.C. § 3553(e), a statutory command that compels the sentencing court to consult the Guidelines Manual. *See* Br. for Pet'rs 19–23; *cf. Peugh* v. *United States*, 569 U.S. 530, 541 (2013). At that point, then, the Guidelines, as explicated in the Commission's "policy statements," *see* U.S.S.G. § 1B1.7—not some "creature of statute," *In re Sealed Case*, 722 F.3d at 369—become the *basis* for the new sentence.[2] And because Petitioners' applicable Guidelines ranges were indisputably lowered by the Commission,

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[2] As Petitioners point out, the Government's previous position in this litigation and others has been that Section 3553(e) removes the statutory minimum from the picture. *See* Br. for Pet'rs 30–31. Indeed, the Government has argued in another context that, "after [a] substantial assistance motion [is] granted," the defendant "[is] still subject to an advisory guideline sentence for the [offense of conviction]." Br. for Appellee at 12, *United States* v. *Becton*, 593 Fed. App'x 469 (6th Cir. 2014) (No. 12-5851), 2014 WL 3556222, at *12.

Petitioners satisfy the eligibility requirements of Section 3582(c)(2).

II. Reading Section 3582(c)(2) in Favor of Applying Mandatory Minimums Runs Counter to Congressional Intent and Contributes to an Unjust Sentencing Policy.

The Sentencing Reform Act was crafted to cabin the nearly unlimited discretion that had long been afforded federal judges in sentencing, which had "led to significant sentencing disparities among similarly situated offenders." *Peugh*, 569 U.S. at 535. Before its enactment, "federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." S. Rep. No. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N., 3182.

The Act established the Commission, whose mission is to create a "detailed set of sentencing guidelines" addressing "all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." S. Rep. No. 98-225, at 168.

Although the Guidelines are no longer mandatory, *see United States* v. *Booker*, 543 U.S. 220, 259–64 (2005), the majority of offenders are either sentenced within the Guidelines range or granted a government-sponsored downward departure. U.S. Sentencing Comm'n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 46 (2017) (hereinafter "U.S.S.C. 2017 Report"). The Guidelines thus remain the starting point for sentences, consistent with this Court's guidance. *See Gall* v. *United States*, 552 U.S. 38, 49 (2007).

Congress envisioned that the Commission would regularly amend the Guidelines to account for various changes in circumstances, including new information that better informs the Commission's choice of sentencing ranges. *See* 28 U.S.C. § 994(o) & (p); *see also Rita* v. *United States*, 551 U.S. 338, 350 (2007) ("The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process."). The Commission is empowered to undertake an amendment process each year, ensuring continuous assessment of the propriety of sentencing ranges. 28 U.S.C. § 994(p). "The guidelines system, as envisioned by Congress, is . . . a self-correcting, and, hopefully, ever-improving system." U.S.S.C. 1991 Report, at iii. Indeed, there had been nearly 800 amendments to the Guidelines as of August 2015. U.S. Sentencing Comm'n, *Federal Sentencing: The Basics* 25 (2015). An essential part of this self-correcting and ever-improving system is the power to make a select number of these amendments to the Guidelines retroactive through Section 3582(c)(2).

Mandatory minimums disrupt this carefully crafted and calibrated system by imposing one-size-fits-all punishments despite differences in culpability. Moreover, they shift the power to determine sentences from an experienced judiciary to prosecutors. And for what? Empirical evidence demonstrates not only that the oft-touted benefits of mandatory minimums are illusory, but also that the harms they impose on individuals and communities are manifest. Simply put, there is no sound basis in law *or* policy to subject offenders to the continued effects of mandatory minimum sentences where, as here, the Government and the court have agreed in a particular case that a mandatory minimum sentence is inappropriate.

A. Mandatory Minimums Interfere with the System of Guided, Flexible Discretion Established by the Sentencing Reform Act.

Since 1991, the Commission has explained that mandatory minimums interfere with central goals of federal sentencing reform: reducing disparities resulting from both prosecutorial and judicial discretion; deterring crime by increasing certainty in punishment; and, perhaps most fundamentally, ensuring proportionality in sentencing. *See* U.S.S.C. 1991 Report, at ii–iii.

Nevertheless, the Commission's view has long been that the Guidelines must take into account statutory dictates. Initially, the Commission incorporated the results of mandatory minimums into the Guidelines by establishing Guidelines ranges slightly above mandatory minimum penalties. *See* U.S.S.C. 2017 Report, at 16. Over time, however, as Congress adjusted mandatory minimums—particularly for drug offenses—the Commission adopted sentencing ranges that *encompass* rather than exceed the mandatory minimum. *Id.* at 17. Thus, the "floor" of the Guidelines range will often fall below the mandatory minimum sentence.

The Commission concluded that the result of interactions between the Guidelines and mandatory minimums is disproportionality in two directions. First, for those offenses in which the floor of the sentencing range is below the mandatory minimum, the offender may be subjected to a harsher sentence than deserved. And second, the Commission pointed to statistics revealing, somewhat counterintuitively, that where offenders are subject to a guideline minimum higher than the mandatory minimum, courts

"often" sentenced such offenders to the mandatory minimum—that is, the mandatory minimum can prompt a sentence *lower* than that recommended by the Guidelines themselves. *See* U.S.S.C. 2017 Report, at 47.

Mandatory minimums also contribute to disproportionate sentences by creating sentencing "cliffs." While the Guidelines provide for a spectrum of sentences that contemplate proportional increases or decreases based on small variations in culpability, so-called sentencing "cliffs" subject an offender whose conduct falls barely within a mandatory minimum offense to *much* harsher punishment than an offender whose conduct falls just outside the reach of that offense, despite the near-identical conduct. U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 91 (2011) (hereinafter "U.S.S.C. 2011 Report"). Even when offenders subject to mandatory minimums receive relief from those penalties, the average sentence is still more than *two times* greater than the average sentence for offenders not subject to a mandatory minimum. U.S.S.C. 2017 Report, at 6.

The judiciary is acutely aware of this tension between the Guidelines and mandatory minimums. In a 2010 survey of federal district judges, most ranked mandatory minimums among the top three factors contributing to sentencing disparities, while seventy-eight percent of judges believed that the Guidelines reduce unwarranted disparities. U.S.S.C. 2011 Report, at 91.

In enacting Section 3553(e), Congress created a limited opportunity to avoid a mandatory minimum and thereby diminish its interference with the guided

system of discretion.[3] That opportunity benefits the government in its investigation and prosecution of criminal activity. As Petitioners' cases demonstrate, a defendant's substantial assistance to the government can result in sentences based on the Guidelines, significantly mitigating the disproportionality caused by the mandatory minimum. *See* Br. for Pet'rs 3–10. There is no sound reason to declare this waiver of the mandatory minimum only temporary—that is, to wipe the waiver away when cooperators later seek modifications of their sentences based on a retroactive amendment to the Guidelines range relevant to their conduct.

This case presents two options when cooperators seek modification of their sentences based on a retroactive amendment to their Guidelines range. The first is to nullify the effect of the mandatory minimum—a choice the prosecution has already approved by requesting a substantial assistance departure. The second is to nullify the effect of the Guidelines and their subsequent amendment. Refusing to apply amendments retroactively where a mandatory minimum was originally implicated, but ultimately not applied, freezes sentences in time, contrary to Congress's vision of an "ever-improving" and evolving sentencing system. It perpetuates a fiction that the offenders were sentenced "based on" a mandatory minimum, belied by actual sentences *below* the minimum. And it interferes with the goals of the Commission, the Guidelines, *and* the prosecution, the last of which successfully sought to shield the defendants from the mandatory minimum as a reward for their

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[3] Certain drug offenses are subject to a "safety valve" that also permits a sentence unshackled from the mandatory minimum. 18 U.S.C. § 3553(f).

assistance in the investigation or prosecution of others. These results are unwarranted and contrary to the law.

B. By Shifting the Power to Decide Sentences to Prosecutors, Mandatory Minimums are Inconsistent with Traditional Notions of Fairness.

Prosecutors typically enjoy unreviewable discretion to choose which charges to file, so long as they are supported by probable cause. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). For instance, where a defendant could be charged with possessing drugs with the intent to distribute, the prosecutor could choose to charge possession with intent to distribute the greatest amount for which evidence is available, the same charge based on some lesser amount, or only a lesser included offense such as simple possession. As such, it is the prosecutor's choice that determines whether a defendant is exposed to a mandatory minimum. *See, e.g.*, 21 U.S.C. § 841(b)(1)(B)(v) (establishing a mandatory minimum sentence for possessing with intent to distribute one gram or more of LSD).[4] The prosecutor's charging decision can therefore "preset" the defendant's sentence, binding the hands of the sentencing judge if the defendant is subsequently found guilty. *See, e.g.*, *United States* v. *Hungerford*, 465 F.3d 1113, 1118–22 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment) ("Hungerford's case is a textbook example of how [mandatory minimum statutes] permit[] a prosecutor, but never a judge, to determine the appropriate sentence."). And it is the

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[4] The prosecutor can also choose whether to file an information under 21 U.S.C. § 851 to trigger (or not) an increased mandatory minimum, *see id.* § 841(b), based on the defendant's prior conviction for certain drug offenses.

prosecutor who controls whether the mandatory minimum can be waived through a motion under Section 3553(e).

This shifting of power is problematic on several levels. Practically, prosecutors, no matter how well-intentioned, generally do not have the same training, experience, or incentives as judges to set appropriate sentences. Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) ("The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way."). For instance, the U.S. Attorney's Manual instructs federal prosecutors to select charges that "maximize the impact of federal resources on crime"—an important consideration, to be sure, but not the only one with penological relevance for an individual defendant. U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-27.300 (2016). And federal prosecutors are told to "charge and pursue the most serious, readily provable offense," which "by definition" are those offenses "that carry the most substantial guidelines sentence, including mandatory minimum sentences." Memorandum from Office of the Attorney General to All Federal Prosecutors, Department Charging and Sentencing Policy 1 (May 10, 2017); *see also Reevaluating the Effectiveness of Mandatory Minimum Sentences: Hearing before the S. Comm. on the Judiciary*, 113th Cong. 4 (2013) (statement of Brett Tolman, former U.S. Attorney) ("[I]nstitutional pressures to prosecute with an eye toward identifying and using mandatory minimum statutes to achieve the longest potential sentence in a given case are severe.").

By adding to the already considerable leverage a prosecutor has over a defendant, the threat of mandatory minimums can be wielded as a "trial tax" to pressure defendants into accepting plea bargains—including, in some cases, when a guilty plea may not be justified. U.S.S.C. 2011 Report, at 97 & nn. 523–24 (citing the Prepared Statement of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, to the Commission, at 13 (May 27, 2010) ("The problem with mandatory minimums is that they have a coercive effect. . . . This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.")). And when defendants refuse the government's plea offer, prosecutors often file charges or seek sentencing enhancements that they were willing to forego just moments before the defendants decided to exercise their constitutional right to trial. *See, e.g.*, *United States v. Kupa*, 976 F. Supp. 2d 417, 432–37 (E.D.N.Y. 2013).

More fundamentally, nowhere else in the law does the prosecuting party effectively set the consequences of a violation. Criminal sentences are ordinarily determined by the judge, guided by a number and variety of factors including the Guidelines. 18 U.S.C. § 3553(a). In those cases the judge may—indeed, must—take into consideration circumstances and factors of the crime beyond those specifically charged and proved by the prosecutor. *See Booker*, 543 U.S. at 223. In a civil case, the amount of damages is ordinarily determined by the jury (or the judge in a bench trial). Similarly, in an administrative hearing, the penalty or fine is determined by a neutral agency decisionmaker. Accordingly, where—as here—the prosecutor has certified that a defendant's cooperation was sufficient to restore the usual order by returning sentencing discretion to the judge, the prosecutor should

not be granted a form of residual control over the defendant's sentence by reimporting the previously waived mandatory minimum into Section 3582(c)(2).

C. Mandatory Minimums Are Largely Ineffective at Deterring Offenders, Reducing Crime, or Inducing Cooperation.

Three key rationales advanced in support of mandatory minimums are that they increase deterrence, reduce crime through incapacitation, and improve cooperation with law enforcement. None of these common contentions holds up to empirical scrutiny.

Deterrence. Proponents claim that mandatory minimums improve deterrence by increasing the certainty and severity of punishment. *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 11 (2010). But since Victorian England, when capital sentences were nominally required for some 220 felonies, mandatory sentences have always been more certain in theory than in practice.

The discretion of prosecutors and law enforcement officers themselves is one reason. According to study results, some law enforcement officers altered their behavior to reduce the likelihood of discovering an offense that came with a mandatory sentence. Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 77–78 (2009) (citing Kenneth Carlson, Nat'l Inst. of Just., U.S. Dep't of Just., *Mandatory Sentencing: The Experience of Two States* 6 (1982) (reviewing the effects of a Massachusetts statute that imposed a one-year sentence on the unlicensed carrying of firearms)). And, as noted, prosecutors may file charges or accept plea deals in a way that avoids a mandatory sentence.

Other actors have had some influence as well. Surveying research from the 1930s through the 2000s, professor Michael Tonry found that juries and judges in the United States and abroad have had a leavening effect by sometimes nullifying the verdict altogether, reducing the charges, or expanding the grounds for departing from the minimums. Tonry, *supra*, at 71–90. The net result is that the supposed certainty of mandatory minimums—and, relatedly, the supposed uniformity they bring—has largely proved to be illusory.

Similarly, studies have found that the marginal deterrent effect of severe mandatory sentences is, to the extent it exists at all, modest and short-lived, particularly when sentences would otherwise already be lengthy. Daniel S. Nagin, *Deterrence*, in *Reforming Criminal Justice Vol. 4: Punishment, Incarceration, and Release* 19, 22–27 (Erik Luna ed., 2017). For instance, in fifteen studies of California's Three-Strikes Law, only one reported a significant deterrent effect; it was outnumbered by the two studies finding that the threat of increased penalties under that law may have *increased* homicides. Tonry, *supra*, at 98–99. And on the federal level, the proliferation of mandatory minimums for drug crimes was not associated with a decrease in the availability of drugs in the nation's high schools. Barbara S. Vincent & Paul J. Hofer, Fed. Jud. Ctr., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 14–16 (1994). Moreover, there is evidence that mandatory sentences lead to increases in recidivism, likely because of both the conditions of incarceration and the difficulties of reintegration post-release—which increase with sentence length. Erik Luna,

Mandatory Minimums, in *Reforming Criminal Justice Vol. 4: Punishment, Incarceration, and Release* 117, 128 (Erik Luna ed., 2017).

Incapacitation. Even if mandatory minimums do not provide general deterrence, they should at least be expected to reduce crime by incapacitating, often for extended periods, convicted criminals. *See* Luna & Cassell, *supra*, at 11–12. Again, the theory does not hold up under scrutiny because of an unintended effect.

Assuming that some would-be offenders are deterred (or incapacitated) by mandatory sentences, it matters little to the criminal organization as a whole if it is able to rapidly recruit replacements. The evidence suggests that narcotics operations demonstrate such "replacement effects." Roger K. Pryzbylski, Colo. Criminal Justice Reform Coal., *Correctional and Sentencing Reform for Drug Offenders* 17–19 (2009). Thus, the incapacitation effect, if any, is offset by a growth in the number of offenders.

Cooperation. Some proponents argue that a prosecutor's discretion to refrain from seeking or to waive mandatory minimums can induce cooperation with law enforcement. *See* Luna & Cassell, *supra*, at 12. Yet the evidence indicates that rates of cooperation are about the same between crimes that are subject to mandatory minimums and those that are not. *Id.* at 19 & n.73 (citing U.S. Sentencing Comm'n, *2008 Sourcebook of Federal Sentencing Statistics* at tbl.27 (2008)). Some have noted that mandatory minimums may even produce a backlash against cooperation, out of concern that others will receive unduly harsh sentences. Luna & Cassell, *supra*, at 20 n.74.

In sum, none of the key rationales for mandatory minimums has much empirical support. On the contrary, the available evidence largely points the other way, and studies dating back two decades have concluded that mandatory minimums are simply not worth their massive cost. *See* Jonathan P. Caulkins et al., RAND Corp., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* xxv (1997); Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, The State Factor, March 2016, at 2. The Court should therefore resist an interpretation of Section 3582(c)(2) that resurrects the impact of a mandatory minimum after the Government has successfully moved to waive it in a particular case.

D. Mandatory Minimums Are Detrimental to Communities and How They View the Criminal Justice System.

Mandatory minimums engender severe distrust of the criminal justice system. They have the effect of making sentences less predictable and transparent because sentences depend on opaque charging decisions. And stories abound of absurd applications of mandatory minimums, such as that of Tonya Drake, a single mother with no criminal history who mailed a package for an acquaintance in exchange for $100. She turned a blind eye to what was inside because she needed the money, only to get sentenced to a mandatory minimum of 10 years because the package contained 233 grams of cocaine. *See* Steven Nauman, Note, Brown v. Plata*: Renewing the Call to End Mandatory Minimum Sentencing*, 65 Fla. L. Rev. 855, 866–67 (2013); *see also* Erin Fuchs, *10 People Who Received Outrageous Sentences for Drug Convictions*, Bus. Insider (Apr. 23, 2013). Indeed, Drake exemplifies the

type of low-level drug offenders mandatory minimums are most often imposed on, *see* U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 20–21 (2007), instead of the "kingpins" whom legislators thought the sentences would target, *see* U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 6 (2002). The frequency and currency of these types of sentences feed into a perception that the sentencing system is deeply unfair and altogether irrational.

The actual effects of mandatory minimums are even more severe than the perceived ones. By extending incarceration, mandatory minimums prolong the disruption to the defendants' families and communities, and reduce the chances of effective reintegration post-release. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 Judicature 6, 7 (2010). FAMM has collected a heart-breakingly large number of perspectives from defendants' relatives, a small number of which are featured on its website, that individually and collectively detail the terrible toll mandatory minimum sentences have imposed. *See Family Perspectives*, FAMM, http://famm.org/prisoner-profiles/stories-from-families-and-friends/ (last visited Jan. 25, 2018). And as FAMM has documented—and has long been recognized—this burden has been disproportionately borne by minority communities. *See* FAMM & Nat'l Council of La Raza, *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States* (Mar. 10, 2006); Vincent & Hofer, *supra*, at 23.

Section 3553(e) permits judges to alleviate some of these burdens on a case-by-case basis by waiving the application of a mandatory minimum in exchange for a defendant's substantial assistance to law enforcement. The salutary effects of that waiver

should not be undone through an interpretation of Section 3582(c)(2) that prevents judges from exercising their discretion to reduce sentences in those cases where the Commission has deemed a reduction appropriate.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 29, 2018

No. 17-5716

IN THE
Supreme Court of the United States

TIMOTHY D. KOONS, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. Section 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions because such cooperators are not subject to statutorily required mandatory minimum sentences 3

II. Alternatively, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions under USSG § 1B1.10(c). 11

III. Alternatively, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions because district courts necessarily consult the offense-specific guideline range at sentencing 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Caraco Pharm. Lab., Ltd., v. Novo Nordisk A/S, 566 U.S. 399 (2012) 9

Dillon v. United States, 560 U.S. 817 (2010) 12, 13, 16

Dorsey v. United States, 567 U.S. 260 (2012) 6

Freeman v. United States, 564 U.S. 522 (2011) 15, 17, 18, 19

Gall v. United States, 552 U.S. 38 (2007) 17

In re Sealed Case, 722 F.3d 361 (D.C. Cir. 2013) 6, 8, 20

Melendez v. United States, 518 U.S. 120 (1996) ... 6, 10

New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010) 10

Peugh v. United States, 569 U.S. 530 (2013) 17

United States v. Billue, 576 F.3d 898 (8th Cir. 2009) 8

United States v. Booker, 543 U.S. 220 (2005) 10

United States v. LaBonte, 520 U.S. 751 (1997) 16

United States v. Savani, 733 F.3d 56 (3d Cir. 2013) .. 6

United States v. Williams, 474 F.3d 1130 (8th Cir. 2007) 8, 9

United States v. Williams, 808 F.3d 253 (4th Cir. 2015) 13

STATUTES

18 U.S.C. § 3553(a) 8
18 U.S.C. § 3553(e) ..... passim
18 U.S.C. § 3582(c)(2) ..... passim
28 U.S.C. § 994 3
28 U.S.C. § 994(a)(2) 12
28 U.S.C. § 994(n) ..... passim
28 U.S.C. § 994(o) 11, 12, 16, 20
28 U.S.C. § 994(p) 11
28 U.S.C. § 994(u) 11, 12, 16, 20

OTHER AUTHORITIES

Fed.R.Crim.P. 11(c)(1)(C) 15, 19
USSG § 1B1.1(a) 3, 4
USSG § 1B1.1(a)(1) 4
USSG § 1B1.1(a)(2) 4
USSG § 1B1.1(a)(3) 4
USSG § 1B1.1(a)(4) 4
USSG § 1B1.1(a)(5) 4
USSG § 1B1.1(a)(6) 4
USSG § 1B1.1(a)(7) ..... passim
USSG § 1B1.1(a)(8) 4
USSG § 1B1.1(b) 5

USSG § 1B1.10 ..... passim
USSG § 1B1.10(b)(1) 7
USSG § 1B1.10(b)(2)(B) 7
USSG § 1B1.10(c) ..... passim
USSG § 1B1.10(d) 7, 12
USSG § 2D1.1 ..... passim
USSG § 2D1.1(a) 4
USSG § 2D1.1(b) 4
USSG § 2D1.1(c) 4, 7, 12
USSG § 2D1.1(d) 4
USSG § 2D1.1(e) 4
USSG § 2D1.1, comment. (n.24) 5
USSG § 5G1.1 ..... 4, 11, 13, 14
USSG § 5G1.1(b) ..... passim
USSG § 5K1.1 ..... passim
USSG § 5K1.1, comment. (n.1) 5
USSG app. C, amend. 759 18
USSG app. C, amend. 780 (Supp. 2016) 8, 13
USSG app. C, amend. 782 (Supp. 2016) 7, 12
USSG, Ch. 3 4
USSG, Ch. 4 4
USSG, Ch.5, Pt.A 4
USSG, Ch.5, Pt.B 4

USSG, Ch.5, Pt.C 4
USSG, Ch.5, Pt.D 4
USSG, Ch.5, Pt.E 4
USSG, Ch.5, Pt.F 4
USSG, Ch.5, Pt.G 4
USSG, Ch.5, Pt.H 5
USSG, Ch.5, Pt.K 5

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF THE ARGUMENT

Criminal defendants who provide substantial assistance to the government, and who receive sentences below an otherwise applicable mandatory minimum sentence pursuant to 18 U.S.C. § 3553(e), are eligible for sentence reductions under 18 U.S.C.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* state that counsel for all parties consented to the filing of this brief.

§ 3582(c)(2). This is so regardless of the procedure used by a sentencing court in any particular case. The relevant statutory and guideline provisions make clear that the sentencing range at the initial sentencing is the offense-specific guideline range (here, USSG § 2D1.1), and not the no-longer-applicable mandatory minimum. When the United States Sentencing Commission ("the Commission") retroactively amends that sentencing range, a reduction under § 3582(c)(2) is appropriate.

Alternatively, assuming that the sentencing range at the initial sentencing is not the offense-specific guideline range, but is instead the guideline sentence under USSG § 5G1.1(b), a reduction under § 3582(c)(2) is still available for § 3553(e) cooperators. This is so because the Commission has provided that the § 3582(c)(2) sentence-reduction analysis must be made "without regard to" § 5G1.1(b). USSG § 1B1.10(c). And for that reason, the "sentencing range" in § 3553(e) cooperator cases has necessarily been lowered via the retroactive reduction to the offense-specific guideline range (here, § 2D1.1).

Finally, a categorical rule permitting § 3582(c)(2) reductions for all eligible § 3553(e) cooperators recognizes that a district court must always consult the offense-specific guideline range when imposing sentence in such a case. This recognition is itself sufficient to find that all § 3553(e) cooperators are initially sentenced based on the offense-specific guideline range (here, § 2D1.1). When that range has subsequently been lowered by the Commission (as § 2D1.1 was here), § 3582(c)(2) permits the district court to reduce the defendant's sentence.

ARGUMENT

I. Section 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions because such cooperators are not subject to statutorily required mandatory minimum sentences.

In 18 U.S.C. § 3553(e), Congress made clear its intent that criminal defendants who cooperate with the government should be rewarded for that cooperation, even in the teeth of a statutorily authorized mandatory minimum sentence. The provision authorizes a district court, upon motion by the government, to sentence a cooperator below an otherwise applicable mandatory minimum sentence. The framework for the imposition of such a sentence is the United States Sentencing Guidelines (guidelines). 18 U.S.C. § 3553(e) ("Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. § 994]."). Indeed, when it established the Sentencing Commission, Congress provided that the "Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance." 28 U.S.C. § 994(n).

The Commission, in turn, did just that. But to understand how, it is important to understand the structure of the guidelines. The first chapter provides an introduction and general application principles. Importantly, USSG § 1B1.1(a) provides instructions to district courts on how to "determine the sentence and the guideline range" in each case. The first five steps

(of eight) instruct district courts to calculate the defendant's offense level using the various provisions in the first three chapters. USSG § 1B1.1(a)(1)-(5). For instance, in drug cases (like the cases at issue here), a district court begins at USSG § 2D1.1. The § 2D1.1 base offense level is generally set by the type and quantity of drug at issue in the case. USSG § 2D1.1(c). The district court then adjusts the offense level up or down depending on characteristics particular to the offense. USSG § 2D1.1(a)-(e); USSG, Ch. 3.

The sixth step in § 1B1.1(a) instructs district courts to determine the defendant's criminal history category via Chapter Four. USSG § 1B1.1(a)(6). The seventh step instructs district courts to "[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above." USSG § 1B1.1(a)(7). In other words, at this step, the district court consults the Sentencing Table, which provides a guideline range based upon the offense level and criminal history category in each case (the offense-specific guideline range). USSG Ch.5, Pt.A.

With this guideline range established, at the eighth step, district courts are instructed to "[d]etermine from Parts B through G of Chapter Five the sentencing requirements and options related to probation [part B], imprisonment [part C], supervision conditions [part D], fines [part E], and restitution [part F]." USSG § 1B1.1(a)(8). In particular, Part G of Chapter Five is geared "to implementing the total sentence of imprisonment." USSG § 5G1.1 addresses "statutorily authorized maximum sentence[s]" and "statutorily required minimum sentence[s]." Section 5G1.1(b) provides that, "[w]here a statutorily *required*

minimum sentence is greater than the maximum of the applicable guideline range, the statutorily *required* minimum sentence shall be the guideline sentence." (emphasis added).

Thus, in the run-of-the-mill case involving a statutory minimum sentence, at step eight, the statutory minimum effectively trumps the guideline range calculated at step seven. But in the § 3553(e) cooperator context, there is no "statutorily required minimum sentence." As explained above, district courts have the authority to sentence § 3553(e) cooperators below any otherwise applicable mandatory minimum sentence. By its plain terms then, § 5G1.1(b) has no application to § 3553(e) cooperators. The guideline range applicable to § 3553(e) cooperators is the range calculated at step seven (USSG § 1B1.1(a)(7)). In this manner, the Commission crafted the guidelines consistently with Congress's directive to the Commission to provide for sentences below the statutory minimum for cooperating defendants, 28 U.S.C. § 994(n). *See also* USSG § 2D1.1, comment. (n.24) (noting, in the drug context, that a "mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a downward departure, as provided in 28 U.S.C. § 994(n), by reason of a defendant's substantial assistance)").

Additionally, after steps seven and eight, § 1B1.1(b) requires district courts to apply "Parts H and K of Chapter Five," as well as any other applicable policy statement within the guidelines. In USSG § 5K1.1, the Commission authorized a downward departure for cooperating defendants, including for § 3553(e) cooperators, USSG § 5K1.1, comment. (n.1). This

provision instructs district courts, upon motion of the government, to "depart from the guidelines." USSG § 5K1.1. Thus, in fulfilling Congress's directive in § 994(n), the Commission has authorized downward departures from the guideline range applicable in cooperator cases (including § 3553(e) cooperator cases).

This Court's precedent generally confirms that a § 3553(e) cooperator's sentencing (or guideline) range has nothing to do with the no-longer-applicable mandatory minimum. *See, e.g., Dorsey v. United States*, 567 U.S. 260, 285 (2012) (noting that § 3553(e) is one of "two mechanisms through which an offender may escape an otherwise applicable mandatory minimum"); *Melendez v. United States*, 518 U.S. 120, 126-129 (1996) (referencing a departure "*from* the applicable Guidelines range" under § 5K1.1, as opposed to the imposition of a sentence "*below* the statutory minimum" under § 3553(e), and not once endorsing a departure "from" the statutory minimum).

And the D.C. Circuit has held as much. *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013) ("granting the § 3553(e) motion freed the district court to use the guideline range and disregard the mandatory minimum"). "The government's substantial assistance motion under 18 U.S.C. § 3553(e) 'waived' the statutory minimum and permitted the district court to impose a lower sentence based on the appellant's applicable guideline range." *Id.* at 368; *see also United States v. Savani*, 733 F.3d 56, 59 (3d Cir. 2013) (noting that, in light of the government's § 3553(e) motion, the district court employed the § 2D1.1 guideline range, and departed further from it, in sentencing one of the defendants).

In sum, Congress directed the Commission to ensure that § 3553(e) cooperators receive sentences below any otherwise applicable statutory minimum sentence. 28 U.S.C. § 994(n); 18 U.S.C. § 3553(e). The Commission did just that by superseding the guideline range with a mandatory minimum only when the mandatory minimum is "required" by statute. USSG § 5G1.1(b). Because a district court is not "required" to impose a mandatory minimum in a § 3553(e) cooperator case, the guideline range in such cases is the offense-specific range calculated at step seven (USSG § 1B1.1(a)(7)). Moreover, under USSG § 5K1.1, a district court can further depart "from the guidelines," even in § 3553(e) cooperator cases.

Under this framework, § 3553(e) cooperators are eligible for sentence reductions under § 3582(c)(2). Here, the retroactive reduction at issue was made to the drug-quantity guideline (USSG § 2D1.1(c)). USSG app. C, amend. 782 (Supp. 2016); USSG § 1B1.10(d) (listing Amendment 782 as retroactive). Thus, § 3553(e) cooperators whose sentencing ranges were based on § 2D1.1(c) are eligible for § 3582(c)(2) reductions. As long as the § 3553(e) cooperator's guideline range has been lowered via the retroactive amendment, the cooperator is eligible for a reduction under § 3582(c)(2). USSG § 1B1.10(b)(1); *see also* USSG § 1B1.10(b)(2)(B) (providing for reductions in cases where a cooperator was sentenced below the applicable guidelines range); USSG § 1B1.10(c) (confirming that § 3553(e) cooperators are eligible for reductions despite an otherwise inapplicable statutory minimum).[2]

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[2] Of course, eligibility is not entitlement. District courts retain discretion to determine the extent, if any, of any authorized

Below, the Eighth Circuit ignored this straightforward approach because of Circuit precedent holding, "[w]hen the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point." J.A. 52 (citing *United States v. Billue*, 576 F.3d 898, 904-905 (8th Cir. 2009)). But Eighth Circuit precedent incorrectly provides that § 5G1.1(b) applies in § 3553(e) cooperator cases. *Billue*, 576 F.3d at 904. As just explained, by its plain terms, § 5G1.1(b) applies only when there is a "statutorily required minimum sentence." Once the government files its § 3553(e) motion, the district court is not "required" to impose any statutory minimum sentence. 18 U.S.C. § 3553(e); *In re Sealed Case*, 722 F.3d at 368; *see also* USSG app. C, amend. 780 (Supp. 2016), reason for amend. (indicating approval of the approach in *In re Sealed Case*). Thus, § 5G1.1(b) has no application in the § 3553(e)-cooperator context. The applicable guideline range is the offense-specific range calculated at step seven (USSG § 1B1.1(a)(7)), without regard to the no-longer-applicable mandatory minimum.

The Eighth Circuit also cited Circuit precedent for the proposition that any "reduction below the statutory minimum must be based exclusively on assistance-related considerations." J.A. 52 (quoting *United States v. Williams*, 474 F.3d 1130, 1131 (8th Cir. 2007)). From this premise, the Eighth Circuit assumed that the Commission could not set as the starting point in a § 3553(e) cooperator case the

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reduction under the factors listed in 18 U.S.C. § 3553(a). 18 U.S.C. § 3582(c)(2).

offense-specific guideline range calculated at step seven (USSG § 1B1.1(a)(7)), but instead had to use the mandatory minimum as the starting point. J.A. 52. According to Eighth Circuit precedent, "the text of § 3553(e)" requires this latter approach. *Williams*, 474 F.3d at 1131.

The Eighth Circuit relied on § 3553(e)'s title – "Limited authority to impose a sentence below a statutory minimum" – as well as the first sentence of § 3553(e), which provides a court with authority "to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance." *Id.* at 1332. But the "limited authority" referred to in the statute's title most naturally means that a district court's § 3553(e) authority is "limited" to those who provide substantial assistance. In other words, the "authority to impose a sentence below a statutory minimum" is "limited" to those who provide substantial assistance. 18 U.S.C. § 3553(e). The provision's title says nothing more than that.

The first sentence of § 3553(e) merely confirms the point: a district court has the authority to sentence below a statutory minimum "so as to reflect a defendant's substantial assistance." The most natural reading of this phrase, again, is that a district court may impose a sentence below a statutory minimum if the defendant provides substantial assistance to the government. *See, e.g., Caraco Pharm. Lab., Ltd., v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012) ("the most natural reading of a statute" controls). Had Congress wanted to constrain district courts' consideration of other non-assistance-related factors, it easily could have done so by including additional language (such as

"*only* so as to reflect" or "to reflect *the extent of* a defendant's substantial assistance"). *See, e.g., New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681 (2010) ("if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language").

This Court's decision in *Melendez* provides further support. *Melendez* held, consistent with § 3553(e)'s text, that a district court cannot impose a sentence below a statutory minimum under § 3553(e) without a government motion invoking § 3553(e). 518 U.S. at 125-126. *Melendez* did not hold that § 3553(e)'s first sentence provided any additional *Congressional constraint on district courts* at sentencing. Instead, *Melendez* held that the second sentence in § 3553(e) (requiring any sentence below a statutory minimum to be imposed in accordance with the guidelines) directed *the Commission to constrain* a district court's discretion at sentencing. *Id.* at 128-129.[3]

Moreover, while *Melendez* recognized that § 5K1.1 "may guide the district court when it selects a sentence below the statutory minimum," *Melendez* did not hold that § 5K1.1 was the *only* guide in such circumstances. *Id.* at 129-130. Nor did *Melendez* imply (let alone hold) that the Commission was required to set the starting point for any § 3553(e) reduction at a point consistent with the (no-longer-applicable) mandatory minimum. Rather, a guidelines scheme that sets a § 3553(e) cooperator's guideline range at step seven, USSG § 1B1.1(a)(7), without applying § 5G1.1(b), is

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[3] *Melendez* was decided in 1996, almost a decade prior to this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Although not relevant here, we doubt that the Commission can "constrain" sentencing courts in this context post-*Booker*.

consistent with *Melendez*'s further indication that the government must file an additional § 5K1.1 motion, in addition to the § 3553(e) motion, in order to authorize a sentence below the offense-specific guideline range. 518 U.S. at 131. In other words, the § 3553(e) motion gets the sentence to the guideline range, whereas an additional § 5K1.1 motion gets the sentence below that range. *See id.*

For all of these reasons, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions. Because the Eighth Circuit held otherwise, this Court should reverse.

II. Alternatively, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions under USSG § 1B1.10(c).

As just explained, the Eight Circuit is wrong to require district courts in § 3553(e) cooperator cases to use the no-longer-applicable mandatory minimum (or § 5G1.1) to calculate the guideline range. But even if not, § 3553(e) cooperators are still eligible for § 3582(c)(2) sentence reductions in light of USSG § 1B1.10(c). The relevant provisions related to retroactive guideline amendments confirm the point.

In 28 U.S.C. § 994(o), Congress authorized the Commission to "review and revise" the guidelines. Section 994(p) directs the Commission to "submit to Congress amendments to the guidelines" each year ("not later than the first day of May"). 28 U.S.C. § 994(p). Such amendments typically take effect on November 1 of that year, "except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress." *Id.* Under 28 U.S.C. § 994(u), "[i]f the Commission reduces the

term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the Commission has the authority to apply the amendment retroactively to "prisoners serving terms of imprisonment for the offense." *See also* 28 U.S.C. § 994(a)(2) (directing the Commission to draft a policy statement to implement § 3582(c)(2)).

The Commission has amended the guidelines over 800 times, with 29 amendments made retroactive to already-sentenced prisoners. *See* USSG § 1B1.10(d) (listing the retroactive amendments). The amendment at issue here, Amendment 782, was made retroactive by the Commission. *Id.* The amendment applies to drug trafficking offenses. USSG app. C, amend. 782, reason for amend. It generally reduces by two levels the offense levels assigned to the various drug quantities tabled at § 2D1.1(c). *Id.* To paraphrase § 994(u), the Commission reduced the term of imprisonment recommended in the guidelines applicable to drug trafficking offenses, and made the reductions retroactive to prisoners serving terms of imprisonment for drug trafficking offenses.

Section 3582(c)(2) recognizes the Commission's authoritative role in retroactive sentence reductions. To be eligible for a reduction, the defendant's sentence must have been "based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o)." 18 U.S.C. § 3582(c)(2). And any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* The applicable policy statement is USSG § 1B1.10. This policy statement binds district courts. *Dillon v. United States*, 560 U.S. 817, 830 (2010). "[Section] 3582(c(2) requires the

[district] court to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized." *Id.* at 827.

In 2014, at the same time the Commission retroactively reduced the guidelines applicable to drug trafficking offenses (§ 2D1.1), the Commission amended § 1B1.10 to ensure that § 3553(e) cooperators were eligible for § 3582(c)(2) sentence reductions. Section 1B1.10(c) expressly provides that, in § 3553(e) cooperator cases, "the amended guideline range shall be determined without regard to the operation of § 5G1.1." Thus, even assuming that § 5G1.1 applies at the initial sentencing in § 3553(e) cooperator cases, the Commission has instructed that such cooperators are nonetheless eligible for § 3582(c)(2) sentence reductions because § 5G1.1 does *not* apply in § 3582(c)(2) proceedings. *See also* USSG app. C, amend. 780 (Supp. 2016), reason for amend. (listing as an example a cooperator whose guideline range fell entirely below the inapplicable mandatory minimum, like the petitioners here, and explaining that this defendant would be eligible for a § 3582(c)(2) sentence reduction).

Section 1B1.10(c), which binds the district courts, and which Congress implicitly approved of, is enough to resolve this case. *United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015). Section 1B1.10(c) "dictates eligibility for § 3582(c)(2) relief." *Id.* at 260. Either § 5G1.1(b) is not applied at sentencing, and a § 3553(e) cooperator is eligible for a § 3582(c)(2) reduction (as explained in Section I above), or § 5G1.1(b) applies at sentencing, and a § 3553(e) cooperator is eligible for a § 3582(c)(2) reduction

because § 1B1.10(c) directs that § 5G1.1(b) is disregarded in the § 3582(c)(2) context.

The Eighth Circuit below acknowledged as much. J.A. 50-51. But the Eighth Circuit nonetheless held that the petitioners were ineligible for reductions because of what it termed § 3582(c)(2)'s "threshold question" – "whether each [petitioner] was sentenced 'based on a sentencing range that has subsequently been lowered by the Sentencing Commission.'" J.A. 51. In so holding, the Eighth Circuit did not rest its decision on any application of § 5G1.1(b) at the initial sentencing, but instead on the application of the (no-longer-applicable) mandatory minimum at the initial sentencing. J.A. 52 ("If § 5G1.1(b) did not exist, the district court would still have set these defendants' sentences at the mandatory minimum before considering a substantial assistance departure.").

The Eighth Circuit's decision is incorrect for three reasons. First, as a practical matter, a district court never sets § 3553(e) "sentences at the mandatory minimum," J.A. 52, because § 3553(e), by its own terms, does away with the mandatory minimum. Second, the Eighth Circuit's analysis ignores the second sentence in § 3553(e), which requires the district court to impose any sentence following a § 3553(e) motion "in accordance with the guidelines." A district court that "sets [a defendant's] sentence[] at the mandatory minimum," J.A. 52, has not imposed sentence "in accordance with the guidelines," 18 U.S.C. § 3553(e). And third, if "§ 5G1.1 did not exist," as the Eighth Circuit assumed, J.A. 52, there would be no feasible way in which to construe the guidelines to require a district court to set the "sentences at the mandatory minimum," *id.* It is only at § 5G1.1 that a

district court is instructed to consider a "statutorily required minimum sentence."

The Eighth Circuit was also wrong to criticize the Commission for ignoring this Court's decision in *Freeman v. United States*, 564 U.S. 522 (2011), when it added section (c) to § 1B1.10. J.A. 54-56. Section 1B1.10(c) applies to cooperators. *Freeman* involves defendants who enter into Rule 11(c)(1)(C) agreements (whether cooperators or not). 564 U.S. at 525. Those two things are not the same. The Rule 11(c)(1)(C) context is different because it involves a "bargain struck between prosecutor and defendant." *Id.* at 531. Rule 11(c)(1)(C) allows the parties to agree to a "specific sentence or sentencing range," and nothing within Rule 11(c)(1)(C) requires an agreed-upon sentence or sentencing range to contemplate the guidelines. Fed.R.Crim.P. 11(c)(1)(C); *see also Freeman*, 564 U.S. at 549 (Roberts, C.J., dissenting) ("The reality is that whenever the parties choose a fixed term, there is no way of knowing what that sentence was 'based on.'"). But here, § 3553(e) requires district courts to sentence cooperators "in accordance with the guidelines." Moreover, nothing within § 1B1.10 addresses Rule 11(c)(1)(C) agreements. In contrast, § 1B1.10(c) expressly addresses § 3553(e) cooperators.

To apply *Freeman*'s holding (whatever it is)[4] beyond the Rule 11(c)(1)(C) context, and to use it to ignore § 3553(e)'s plain text, as well as a binding policy statement directly on point (and not disapproved of by Congress) is a stretch too far. This is particularly true in light of this Court's previous recognition that, when

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[4] This Court has granted certiorari to revisit *Freeman* (or at least clarify its holding) in *Hughes v. United States*, No. 17-155.

Congress has instructed the Commission to promulgate a particular requirement, the "number of steps the Commission employs to achieve that requirement is unimportant." *United States v. LaBonte*, 520 U.S. 751, 761 (1997). The requirements here are three-fold: (1) to ensure that the guidelines reward § 3553(e) cooperators with lower sentences, 28 U.S.C. § 994(n); (2) to amend the guidelines when warranted, 28 U.S.C. § 994(o); and (3) to determine whether any such amendments should be made retroactive, 28 U.S.C. § 994(u). The Commission took the appropriate steps to achieve these requirements by: (1) limiting the application of § 5G1.1(b) to statutorily required minimum sentences; (2) promulgating § 5K1.1; (3) retroactively reducing the guidelines applicable to drug trafficking offenses; and (4) eliminating § 5G1.1(b) from the retroactivity analysis under § 1B1.10(c) in order to ensure that § 3553(e) cooperators convicted of drug trafficking offenses are eligible for § 3582(c)(2) reductions.

These steps fit comfortably with § 3582(c)(2)'s text, which predicates sentence reductions upon both the existence of a retroactive guideline amendment and consistency with the Commission's applicable policy statements. *Dillon*, 560 U.S. at 827. If a district court ignores § 5G1.1(b) (as it should) and originally sentences a § 3553(e) cooperator based on his offense-specific guideline range, § 3582(c)(2) relief will be available if the Commission later retroactively lowers that range. But even if a district court originally sentences a § 3553(e) cooperator based on § 5G1.1(b), § 3582(c)(2) relief will still be available upon a later retroactive guideline amendment, given the Commission's instruction (via § 1B1.10(c)) to ignore

§ 5G1.1(b) when determining the cooperator's amended guideline range. Either way, categorically, § 3553(e) cooperators are eligible for § 3582(c)(2) reductions.

III. Alternatively, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions because district courts necessarily consult the offense-specific guideline range at sentencing.

If this Court is not yet convinced that § 3553(e) cooperators are eligible for § 3582(c)(2) reductions, one additional consideration should tip the scales in petitioners' favor: when sentencing § 3553(e) cooperators, § 3553(e)'s plain text requires district courts to impose sentence "in accordance with the guidelines." As with sentencings in general, "district courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh v. United States*, 569 U.S. 530, 541 (2013) (emphasis in original) (quoting *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007)). "The Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion." *Freeman*, 564 U.S. at 529 (plurality opinion). "Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence." *Id.* (citations omitted).

The *Freeman* plurality correctly applied these principles to the § 3582(c)(2) context.

> [Section 1B1.10] seeks to isolate whatever

> marginal effect the since-rejected Guideline had on the defendant's sentence. Working backwards from this purpose, § 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement. This is the only rule consistent with [§ 1B1.10], a [binding policy] statement that rests on the premise that a Guideline range may be one of many factors that determine the sentence imposed.

Id. at 530. These principles apply with even more force in the § 3553(e) cooperator context. This issue involves criminal defendants who readily admitted guilt and who provided substantial assistance to the government. *See, e.g.*, USSG app. C, amend. 759, reason for amend. (noting that the "guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when" non-cooperating defendants are still subject to the guideline or statutory minimum). To permit § 3582(c)(2) reductions only where the district court at the initial sentencing ignored § 5G1.1(b) and instead used the § 2D1.1 guideline range "would permit the very disparities the Sentencing Reform Act seeks to eliminate," *Freeman*, 564 U.S. at 533, and which § 1B1.10(c) *in fact* eliminates.

For these reasons, it is particularly appropriate for

this Court to hold that all § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions. In such cases, the sentencing court's sentence is not just "likely to be based on the Guidelines," *Freeman*, 564 U.S. at 534, but is instead *required* to be based on the guidelines, 18 U.S.C. § 3553(e). "This straightforward analysis would avoid making arbitrary distinctions between similar defendants based on the [district court's initial sentencing procedure]. And it would also reduce unwarranted disparities in federal sentencing, consistent with the purposes of the Sentencing Reform Act." *Freeman*, 564 U.S. at 534.

As we read *Freeman*, eight Justices thought a categorical rule should apply to § 3582(c)(2) eligibility in the Rule 11(c)(1)(C) context. The four-Justice plurality concluded that the district court was required to consider "the relevant sentencing range" in every case, "even if the defendant and prosecutor recommend a specific sentence as a condition of the guilty plea." 564 U.S. at 530. In contrast, the four dissenting Justices concluded that "the sentence imposed under a Rule 11(c)(1)(C) plea agreement is based on the agreement, not the Sentencing Guidelines." 564 U.S. at 544 (Roberts, C.J., dissenting). The plurality and the dissent agreed that the concurrence's case-by-case approach was "arbitrary and unworkable." *Id.* The recent grant in *Hughes* confirms the point. *See* n.4, *supra*.

If a categorical approach is in order (and we think it is), the only plausible approach is the one that deems all § 3553(e) cooperators eligible for sentence reductions under § 3582(c)(2). That approach aligns with § 3553(e) and § 3582(c)(2)'s plain text, § 1B1.10(c)'s express terms, and the authority

delegated by Congress to the Commission in 28 U.S.C. §§ 994 (n), (o), and (u). A contrary categorical rule, excluding all § 3553(e) cooperators from § 3582(c)(2) sentence reductions, would exclude even those § 3553(e) cooperators who were sentenced exclusively with reference to their § 2D1.1 guideline ranges, *see In re Sealed Case*, 722 F.3d at 366-368, an implausible result under the applicable statutes and provisions. And a case-by-case approach, permitting § 3582(c)(2) sentence reductions for some § 3553(e) cooperators but not others, would create unwarranted disparities and produce an arbitrary and unworkable standard for the lower courts. Section 3553(e) cooperators (like petitioners) are eligible for § 3582(c)(2) sentence reductions. The Eighth Circuit erred in holding otherwise.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 17-5716

In the Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals erred in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory guideline sentencing range was below a statutory mandatory minimum and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence under 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline Amendment 782, which lowered the base offense levels assigned to most drug quantities?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The Eighth Circuit's Categorical Rule Is Contrary to the Governing Statutes and This Court's Construction of Section 3582(c)(2)'s Threshold Condition for Eligibility, "Based On." 5

A. The plain meaning of the governing statutes compels the conclusion that petitioners are eligible for sentence reductions. 5

B. The Eighth Circuit's categorical rule is contrary to this Court's construction of the term "based on." 10

II. District Court Practice Across the Nation Accords with the Correct Reading of Section 3553(e) and the Relevant Guidelines and Policy Statements, Basing Sentences for Cooperating Defendants on the Guideline Range. 14

A. The correct reading of Section 3553(e) and the relevant policy statements requires that courts base substantial assistance sentences on the applicable guideline range. 14

B. District courts routinely impose sentences below or within the applicable guideline range, and otherwise base sentences on that range, in cases like those of petitioners ... 18

III. The Principles Underlying the Sentencing Reform Act Favor the Petitioners' Eligibility for Sentence Reductions. 25

A. Congress intended Section 3582(c)(2) to promote fairness and reduce arbitrary outcomes. 25

B. The retroactive application of an amendment demonstrates a reasoned judgment that the change is significant enough to compel reconsideration of existing sentences 26

C. Section 3553(e) and Section 3582(c)(2) are not inconsistent and should operate in a complementary fashion. 27

D. The Eighth Circuit's rule creates unwarranted disparity and unjust results, in contravention of the goals of the Sentencing Reform Act. 29

CONCLUSION 36

TABLE OF AUTHORITIES

Cases

Dorsey v. United States,
567 U.S. 260 (2012) 7, 14
Freeman v. United States,
564 U.S. 522 (2011) ..... passim
In re Sealed Case,
722 F.3d 361 (D.C. Cir. 2013) ..... passim
Kimbrough v. United States,
552 U.S. 85 (2007) 27
Melendez v. United States,
518 U.S. 120 (1996) 16
United States v. Alvarez,
51 F.3d 36 (5th Cir. 1995) 18
United States v. C.D.,
848 F.3d 1286 (10th Cir. 2017) 4
United States v. Carter,
595 F.3d 575 (5th Cir. 2010) 23
United States v. Casiano,
113 F.3d 420 (3d Cir. 1997) 17
United States v. Chapman,
532 F.3d 625 (7th Cir. 2008) 17
United States v. Davis,
679 F.3d 190 (4th Cir. 2012) 17
United States v. Glover,
686 F.3d 1203 (11th Cir. 2012) 9
United States v. Golden,
709 F.3d 1228 (8th Cir. 2013) 9
United States v. Grant,
636 F.3d 803 (6th Cir. 2011) 17
United States v. Jackson,
577 F.3d 1032 (9th Cir. 2009) 4

United States v. Johnson,
732 F.3d 109 (2d Cir. 2013) 9
United States v. Johnson,
747 F.3d 915 (7th Cir. 2014) 4
United States v. Joiner,
727 F.3d 601 (6th Cir. 2013) 9
United States v. Koons,
850 F.3d 973 (8th Cir. 2017) 3
United States v. LaBonte,
520 U.S. 751 (1997) 35
United States v. Manella,
86 F.3d 201 (11th Cir. 1996) 17
United States v. Mariano,
983 F.2d 1150 (1st Cir. 1993) 17
United States v. McCraney,
99 F. Supp. 3d 651 (E.D. Tex. 2015) 33
United States v. Roa-Medina,
607 F.3d 255 (1st Cir. 2010) 4, 23
United States v. Savani,
733 F.3d 56 (3d Cir. 2013) ..... passim
United States v. Webster,
54 F.3d 1 (1st Cir. 1995) 18
United States v. Williams,
103 F.3d 57 (8th Cir. 1996) 28
United States v. Williams,
551 F.3d 182 (2d Cir. 2009) 4
United States v. Wills,
35 F.3d 1192 (7th Cir. 1994) 14
United States v. Winebarger,
664 F.3d 388 (3d Cir. 2011) 17
United States v. Wren,
706 F.3d 861 (7th Cir. 2013) 10
United States v. Young,
960 F. Supp. 2d 881 (N.D. Iowa 2013) 35

Statutes

18 U.S.C. § 3553(a) 5, 6, 7
18 U.S.C. § 3553(e) ..... passim
18 U.S.C. § 3582(c)(2) ..... passim
21 U.S.C. § 851 ..... 34, 35
28 U.S.C. § 991(b)(1)(B) 25, 34
28 U.S.C. § 991(b)(1)(C) 25
28 U.S.C. § 991(b)(2) 25
28 U.S.C. § 994(b) 5, 7, 8
28 U.S.C. § 994(n) 6, 15, 16
28 U.S.C. § 994(o) 25
28 U.S.C. § 994(u) 4, 9

Federal Sentencing Guidelines

U.S.S.G. § 1B1.1(a) 15
U.S.S.G. § 1B1.1(b) 16
U.S.S.G. § 1B1.10 ..... 3, 26
U.S.S.G. § 1B1.10(a)(2)(B) 2, 9
U.S.S.G. § 1B1.10(b)(2)(B) 28
U.S.S.G. § 1B1.10(c) 2, 3, 9
U.S.S.G. § 1B1.10(d) 26
U.S.S.G. § 2D1.1(b) 30
U.S.S.G. § 2D1.1(c) 2, 18, 26
U.S.S.G. § 5G1.1(b) ..... passim
U.S.S.G. § 5K1.1 ..... 11, 12, 14, 16
U.S.S.G. app. C, amend. 713 (2008) 26
U.S.S.G. app. C, amend. 780 (2014) 2, 3, 9, 10
U.S.S.G. app. C, amend. 782 (2014) 27
U.S.S.G. Ch. 1, Pt. A 6

Legislative Materials

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 6
H.R. Rep. No. 103-460 (1994) 25

S. Rep. No. 98-225 (1983) 26
Sentencing Reform Act of 1984, Pub. L. 98–473 .. 6, 25

Rules

Fed. R. Crim. P. 11(c)(1)(C) 10, 11
Sup. Ct. R. 37.3(a) 1
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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD attorneys represent tens of thousands of individuals sentenced in federal court each year, and have represented thousands of individuals in proceedings under 18 U.S.C. § 3582(c)(2), some similarly situated to petitioners. The issue presented in this case is of great importance to our work and to the welfare of our clients.

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[1] The parties to the case have consented in writing to the filing of this brief. Sup. Ct. R. 37.3(a). No counsel for a party authored any part of this brief, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

INTRODUCTION

AND SUMMARY OF THE ARGUMENT

To be eligible for a discretionary sentence reduction under 18 U.S.C. § 3582(c)(2), a defendant must satisfy two conditions: (1) he was originally "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," and (2) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2). The two conditions require distinct, if related, inquiries: a retrospective determination that the defendant's original sentence was "based on" a subsequently-lowered "sentencing range" as required by the statute, and a prospective determination that the amendment has "the effect of lowering the defendant's applicable guideline range" as required by the relevant policy statement.[2]

This case involves only the first condition. The issue is whether the sentences of defendants initially subject to mandatory minimum terms for drug crimes, but relieved of those terms under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, were "based on" U.S.S.G. § 2D1.1(c)—a guideline that sets forth "sentencing

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[2] U.S.S.G. § 1B1.10(a)(2)(B). Relevant to this second condition, the policy statement further provides that when, as here, the district court had the authority to impose a sentence below a mandatory minimum pursuant to a § 3553(e) motion, "the amended guideline range shall be determined without regard to the operation of §5G1.1," that is, without regard to the otherwise applicable mandatory minimum. *Id.*, § 1B1.10(c); U.S.S.G. app. C, amend. 780 (2014).

ranges" that have subsequently been lowered by the Sentencing Commission.

The Eighth Circuit answered with a categorical "no." It reasoned that U.S.S.G. § 5G1.1(b) establishes the mandatory minimum as the "guidelines range," such that "the advisory sentencing range became irrelevant." *United States v. Koons*, 850 F.3d 973, 977 (8th Cir. 2017) (internal citation omitted). Thus, the court said, when a district court grants a § 3553(e) motion, it "must use the mandatory minimum as the starting point," and any reduction "must be based exclusively on assistance-related considerations." *Id.* (internal citations omitted). Hence, the Eighth Circuit concluded, petitioners' prison terms were solely "based on" their "statutory mandatory minimum sentence[s] and [their] substantial assistance."[3] *Id.*

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[3] The court of appeals "accept[ed]" that the Commission lowered petitioners' guidelines ranges through Amendment 780's addition of U.S.S.G. § 1B1.10(c), *Koons*, 850 F.3d at 976 n.1, thus satisfying the condition that a sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission," *id.* at 977. At the same time, it suggested that the Commission had no authority to promulgate Amendment 780, asserting that § 1B1.10(c) "ignores" § 3582(c)(2)'s "based on" requirement. *Id.* at 978-79. But the instruction to determine whether the original sentence was "based on" a "sentencing range" is directed to the district courts, *see* 18 U.S.C. § 3582(c)(2), and is "an inquiry that is within their own special knowledge and expertise." *Freeman v. United States*, 564 U.S. 522, 532 (2011). The Commission did not purport to interpret that term, but to clarify its own policy statement. *See* U.S.S.G., app. C, amend. 780 (2014) (reason for amendment) (explaining that amendment resolves a circuit conflict over "when, if at all, § 1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below

Employing similar reasoning, six other courts of appeals have likewise held, categorically, that the sentences of prisoners like petitioners initially subject to a mandatory minimum can never be "based on" a "sentencing range" subsequently lowered by the Commission, despite the district court's grant of a substantial assistance motion and regardless whether the district court relied on the guideline range in imposing sentence.[4] But two circuits have held, correctly as a matter of law and actual practice, that the sentences of prisoners in petitioners' circumstances may indeed be "based on" a subsequently lowered "sentencing range."[5]

The Eighth Circuit's categorical bar to eligibility for a sentence reduction for defendants in petitioners' circumstances is contrary to the relevant statutes,

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the statutory minimum due to substantial assistance"). In doing so, the Commission acted well within its power to "specify under what circumstances and by what amount" sentences may be retroactively reduced. 28 U.S.C. § 994(u).

[4] *See United States v. Roa-Medina*, 607 F.3d 255, 259-60 (1st Cir. 2010); *United States v. Williams*, 551 F.3d 182, 187 (2d Cir. 2009); *United States v. Carter*, 595 F.3d 575, 576-80 (5th Cir. 2010); *United States v. Johnson*, 747 F.3d 915, 917 (7th Cir. 2014); *United States v. Jackson*, 577 F.3d 1032, 1034-36 (9th Cir. 2009); *United States v. C.D.*, 848 F.3d 1286, 1288-93 (10th Cir. 2017).

[5] *See In re Sealed Case*, 722 F.3d 361, 364-66, 368-71 (D.C. Cir. 2013); *United States v. Savani*, 733 F.3d 56, 67 (3d Cir. 2013); *id.* at 71-72 (Fuentes, J., concurring). These circuits also held that such a reduction was "consistent with applicable policy statements issued by the Sentencing Commission," in that an amendment to the drug guidelines had "the effect of lowering the defendant's applicable guideline range." *See In re Sealed Case*, 722 F.3d at 366-68; *Savani*, 733 F.3d at 58, 61-67.

contrary to the guidelines and policy statements, contrary to actual sentencing practice in the district courts, and contrary to the principles of fairness and justice underlying all of these.

ARGUMENT

I. The Eighth Circuit's Categorical Rule Is Contrary to the Governing Statutes and This Court's Construction of Section 3582(c)(2)'s Threshold Condition for Eligibility, "Based On."

A. The plain meaning of the governing statutes compels the conclusion that petitioners are eligible for sentence reductions.

What it means, under § 3582(c)(2), to be "based on" a "sentencing range" is answered by the seminal governing statutes Congress enacted over thirty years ago. This Court should read the statutes as written.

Section 3553(a) sets out the "[f]actors to be considered in imposing a sentence." One of those factors appears in subsection (a)(3): "the kinds of sentences available." When the statutory minimum is ten years, only a sentence of at least ten years is "available" under subsection (a)(3).

Another one of those factors to be considered appears in subsection (a)(4): "the sentencing range." Congress directed that the Sentencing Commission, "in the guidelines . . . shall, for each category of offense involving each category of defendant, establish a sentencing range." 28 U.S.C. § 994(b). And it

explained to the courts that the "sentencing range" was to be established by the Commission through its "guidelines" with the same two parameters: "the applicable category of offense," later known as the offense level, "committed by the applicable category of defendant," later known as the criminal history category. 18 U.S.C. § 3553(a)(4)(A). In other words, this "sentencing range" that Congress directed the courts to consider would be the range corresponding to the offense level and criminal history category on the sentencing table that Congress expected the Commission to create.[6] *See* U.S.S.G. Ch. 1, Pt. A(1) (stating that the Commission "is required to prescribe guideline ranges that . . . coordinat[e] the offense behavior categories with the offender characteristic categories.").

Obviously, when a statutory minimum is higher than the Commission's "sentencing range," the "sentences available" under subsection (a)(3) would eclipse the "sentencing range" under subsection (a)(4). But, Congress directed that "[u]pon motion of the Government" under 18 U.S.C. § 3553(e), "the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance."[7] When a defendant is "relieved of" an "otherwise applicable mandatory minimum" through the § 3553(e) "mechanism," *Dorsey v. United States*, 567

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[6] 18 U.S.C. §§ 3553 and 3582(c)(2), as well as 28 U.S.C. § 994(b), were enacted with the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a), § 217(a).

[7] 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) were enacted with the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § § 1007, 1008.

U.S. 260, 285 (2012), all term-of-months sentences are "available" under § 3553(a)(3). In the case of a cooperator whose otherwise applicable mandatory minimum has been rendered inoperable by § 3553(e), Congress certainly expected that the sentence would be "based on" the "sentencing range" that it directed both the Commission to establish in 28 U.S.C. § 994(b) and the courts to consider in 18 U.S.C. § 3553(a)(4)(A), viz., the "sentencing range" corresponding to the offense level and criminal history category on the sentencing table. Indeed, Congress directed in § 3553(e) that the sentencing judge "shall" impose sentence "in accordance with the guidelines," which of course means that "sentencing range."

Thus, when Congress referred in § 3582(c)(2) to a term of imprisonment "based on" a "sentencing range"—and that term was imposed on a cooperator after a § 3553(e) motion—Congress expected that the "sentencing range" would be the one corresponding to the offense level and criminal history category on the sentencing table, the one called the "sentencing range" in 28 U.S.C. § 994(b) and 18 U.S.C. § 3553(a)(4).

Notwithstanding the straightforward language of the governing statutes, the Eighth Circuit, and several other courts of appeals, have relied on U.S.S.G. § 5G1.1(b) to hold that a mandatory minimum is the applicable "guideline range" before and after any retroactive amendment to the guidelines, and notwithstanding a § 3553(e) motion. But Congress could not have intended that the mandatory minimum, labeled the "guideline sentence" by § 5G1.1(b), would be the "sentencing range" under 18 U.S.C. § 3582(c)(2), 18 U.S.C. § 3553(a)(4), or 28

U.S.C. § 994(b). For one thing, § 5G1.1(b) did not exist until three years after Congress enacted those statutes in 1984.[8] More important, a mandatory minimum is not a "sentencing range" established by the Commission in the "guidelines" based on a defendant's offense level and criminal history, and a defendant is "not assigned a new offense level or criminal history category by operation of the mandatory minimum." *United States v. Savani*, 733 F.3d 56, 63 n.5 (3d Cir. 2013); *see also In re Sealed Case*, 722 F.3d 361, 369 (D.C. Cir. 2013) (appellant's "mandatory minimum cannot correspond to his offense level and criminal history because it is a creature of statute, unaffected by those variables.").

Moreover, by its own terms, § 5G1.1(b) does not apply following a motion by the government under § 3553(e). U.S.S.G. § 5G1.1(b) ("Where a *statutorily required* minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." (emphasis added)). Because no minimum is "statutorily required" upon grant of a motion under § 3553(e), the "applicable guideline range" applies. Section 5G1.1(b) itself does no work. It simply states what would be true by operation of law *if* no mechanism for relief from a mandatory minimum applied, and it simply labels the mandatory minimum the "guideline sentence." This artificial designation is surely not what Congress had in mind when it provided for sentence reductions for defendants whose sentences were "based on" a "sentencing range"

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[8] U.S.S.G. § 5G1.1 did not exist until November 1, 1987. *See* U.S.S.G. § 5G1.1, Historical Note.

subsequently lowered by the Sentencing Commission. The Commission, of course, cannot lower a mandatory minimum.

At the same time Congress enacted § 3582(c)(2), it gave the Commission broad authority to "specify under what circumstances and by what amount" sentences may be retroactively reduced. 28 U.S.C. § 994(u). The Commission exercised that authority to ensure that defendants like petitioners are eligible for relief under the second condition —"consisten[cy] with applicable policy statements issued by the Sentencing Commission." In 2014, the Commission clarified that when a district court had the authority to impose a sentence below a mandatory minimum pursuant to a § 3553(e) motion, "then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1." U.S.S.G. § 1B1.10(c); *id.*, app. C, amend. 780 (2014).

In doing so, the Commission resolved a conflict between the circuits. Four circuits had held that the bottom of the amended "guideline range" is the mandatory minimum pursuant to § 5G1.1 notwithstanding a § 3553(e) motion at the original sentencing, such that a retroactive amendment does not "have the effect of lowering the defendant's applicable guideline range," U.S.S.G. § 1B1.10(a)(2)(B).[9] Three other circuits had held that,

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[9] *See United States v. Golden*, 709 F.3d 1228, 1231-33 (8th Cir. 2013); *United States v. Glover*, 686 F.3d 1203, 1204, 1206-08 (11th Cir. 2012); *United States v. Joiner*, 727 F.3d 601, 604-09 (6th Cir. 2013); *United States v. Johnson*, 732 F.3d 109, 111-15 (2d Cir. 2013).

under such circumstances, the bottom of the amended guideline range is the bottom of the amended guideline range as determined by the Sentencing Table, such that defendants are eligible for relief.[10] *See* U.S.S.G. app. C, amend. 780 (reason for amendment). The 2014 policy statement assures that—whatever the circuit rule—§ 5G1.1 does not operate to determine the amended guideline range for purposes of eligibility under the policy statement.

Congress created § 3582(c)(2) to allow retroactive sentence reductions for defendants sentenced to a term of imprisonment "based on" a "sentencing range" that the Sentencing Commission later concluded was too harsh. And it created § 3553(e) to encourage cooperation with authorities in the investigation and prosecution of others. As far as Congress and its statutes are concerned, there is no justification for categorically depriving cooperators of § 3582(c)(2) relief, much less an arbitrary subset of cooperators, simply because their guideline ranges were below a mandatory minimum of which they have been relieved.

B. The Eighth Circuit's categorical rule is contrary to this Court's construction of the term "based on."

While this Court did not settle in *Freeman v. United States*, 564 U.S. 522 (2011), on a single interpretation of the term "based on" in the context of Fed. R. Crim. P. 11(c)(1)(C) pleas, the plurality's

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[10] *See United States v. Wren*, 706 F.3d 861, 862-63 (7th Cir. 2013); *Savani*, 733 F.3d at 61-67; *In re Sealed Case*, 722 F.3d at 366-70.

general definition of the term and its reasoning in rejecting a "categorical bar" in that case are instructive in this context. *See id.* at 535 (agreeing with the plurality "in the normal course" but stating that sentencing under Rule 11(c)(1)(C) agreements "is different") (Sotomayor, J., concurring). As the plurality observed:

> In every case the judge must exercise discretion to impose an appropriate sentence. This discretion, in turn, is framed by the Guidelines. And the Guidelines must be consulted, in the regular course, whether the case is one in which the conviction was after a trial or after a plea, including a plea pursuant to an agreement that recommends a particular sentence.

Id. at 525-26 (plurality opinion).

The same is true when a court sentences a defendant pursuant to a § 3553(e) motion. Section 3553(e) itself requires the district court to impose sentence "in accordance with the guidelines," and also "in accordance" with the relevant "policy statement," which in turn provides that the court "may depart from the guidelines." U.S.S.G. § 5K1.1. The sentence "may therefore be based on the Guidelines," *Freeman*, 564 U.S. at 526 (plurality opinion), even though the defendant was initially subject to a mandatory minimum, and even if the Eighth Circuit is correct that the court must start at the mandatory minimum.

If the district court later determines in ruling on a § 3582(c)(2) motion that its "decision to impose a

sentence [was] based on a range later subject to retroactive amendment, § 3582(c)(2) permits a sentence reduction." *Freeman*, 564 U.S. at 526 (plurality opinion). The district court should "revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence." *Id.* at 530. Given that § 3553(e) requires imposition of sentence "in accordance" with the guidelines, and that § 5K1.1 permits a departure "from the guidelines," there can be no legal justification for a rule dictating that the guidelines were categorically *not* a relevant part of the analytic framework.

Indeed, the Eighth Circuit's "categorical bar" would "prevent district courts from making an inquiry that is within their own special knowledge and expertise," a statutorily required "inquiry into the reasons for a judge's sentence." 564 U.S. at 532-33 (plurality opinion).

> What is at stake in this case is a defendant's eligibility for relief, not the extent of that relief. Indeed, even where a defendant is permitted to seek a reduction, the district judge may conclude that a reduction would be inappropriate. District judges . . . can rely on the frameworks they have devised to determine whether and to what extent a sentence reduction is warranted in any particular case.

Id. at 532 (plurality opinion).

The outcomes in *Savani* and *In Re Sealed Case* are consistent with this framework. In those cases, the courts of appeals reasoned that the defendants were legally eligible for sentence reductions and remanded for district court determinations on the facts of each case. *See Savani*, 733 F.3d at 67 ("Because the district courts that sentenced these defendants either held that the defendant was not eligible for a reduction because of the mandatory minimum or did not state whether the § [3582(c)(2)] motion was being denied as a matter of law because of the mandatory minimum or a matter of discretion, we will vacate the orders and remand the . . . cases to their respective courts for further proceedings in accord with *Freeman* . . . and with the discretion of the district courts."); *In re Sealed Case*, 722 F.3d at 370 ("Because the district court has authority to reduce the appellant's sentence, we remand for further § 3582(c)(2) proceedings . . . so that the district court may consider whether the facts of the appellant's case warrant a reduced sentence."). The same result is appropriate in petitioners' cases, given that the district court relied on the guideline ranges, at least in part, in imposing petitioners' original sentences. Pet. Br. at 3-10, 22-24.

II. District Court Practice Across the Nation Accords with the Correct Reading of Section 3553(e) and the Relevant Guidelines and Policy Statements, Basing Sentences for Cooperating Defendants on the Guideline Range.

A. The correct reading of Section 3553(e) and the relevant policy statements requires that courts base substantial assistance sentences on the applicable guideline range.

The correct reading of § 3553(e) is that when the "statutory minima ... lie above the range of sentences the Sentencing Commission thinks best," in exchange for assistance, "the prosecutor can remove the barrier to the use of the guideline range." *United States v. Wills*, 35 F.3d 1192, 1193 (7th Cir. 1994) (Easterbrook, J., dissenting on other grounds); *see also Dorsey*, 567 U.S. at 285 (Section 3553(e) is one of "two mechanisms through which an offender may escape an otherwise applicable mandatory minimum"); *In re Sealed Case*, 722 F.3d at 366 ("granting the § 3553(e) motion freed the district court to use the guideline range and disregard the mandatory minimum"). And even if the Eighth Circuit were correct that the no-longer-applicable mandatory minimum must be the starting point, nothing in § 5K1.1 or any other provision indicates that the district court may not consider the guideline range in determining the ending point.

The Eighth Circuit's premise that a sentence imposed under 18 U.S.C. § 3553(e) must be "based on" the statutory mandatory minimum is incorrect as a matter of law. To the contrary, § 3553(e) and related

statutes and Guideline provisions render the mandatory minimum inoperable in the wake of the government's substantial assistance motion, and specify that the district court shall instead impose sentence in accordance with the guidelines and policy statements.

As discussed above, the statutory language is clear that a sentence for substantial assistance "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." 18 U.S.C. § 3553(e). Congress also directed the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than otherwise imposed, including a sentence that is lower than that established by statute as a mandatory minimum, to take account of a defendant's substantial assistance." 28 U.S.C. § 994(n).

The guidelines and policy statements reflect Congress's directives. As in any case, a cooperator's sentencing determination begins by first calculating the applicable guideline range, pursuant to U.S.S.G. § 1B1.1(a)(1)-(7)—by reference to the offense level and criminal history category. When a mandatory minimum applies in a non-cooperation case, § 1B1.1(a)(8) then requires reference to § 5G1.1(b), which states that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum shall be the guideline sentence." But, where the government has made a § 3553(e) motion, no mandatory minimum is "statutorily required." In such a case, § 5G1.1(b) has no influence on the applicable guideline range, and sentencing

proceeds to § 1B1.1(b) (the "court shall then consider Parts H and K of Chapter Five") and consideration of § 5K1.1.

Pursuant to 28 U.S.C. § 994(n), and as referenced in § 3553(e), the Commission promulgated policy statement § 5K1.1. Section 5K1.1 does two things. First, it states that "[u]pon motion of the government stating that the defendant has provided substantial assistance," the court "may depart *from the guideline range*" (emphasis added), not from the "guideline sentence" referenced in § 5G1.1(b). Thus, when, as is typical, the government has moved under both § 3553(e) and § 5K1.1, § 3553(e) authorizes a sentence below the no-longer-applicable mandatory minimum "in accordance with the guidelines," and the policy statement authorizes a departure "from the guideline range." Second, § 5K1.1 provides a non-exhaustive list of considerations that "may guide the district court when it selects a sentence below the statutory minimum, as well as when it selects a sentence below the Guidelines range." *Melendez v. United States*, 518 U.S. 120, 129 (1996).

These considerations "may include, but are not limited to" the significance and usefulness of the cooperation; the truthfulness, completeness and reliability of any information or testimony provided; the nature and extent of the defendant's assistance; any injury suffered or any danger or risk of injury to the defendant or his family; and the timeliness of the defendant's assistance. U.S.S.G. § 5K1.1(a)(1)-(5). "The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude

is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above." *Id.*, comment. (backg'd.).

Given this wide "latitude," courts of appeals have held in numerous cases that district courts may consider factors that are embodied in other aspects of the guidelines in determining the extent of a reduction upon motion of the government under 18 U.S.C. § 3553(e), U.S.S.G. § 5K1.1, or Rule 35(b), including the nature and seriousness of the offense, the defendant's criminal history, proportionality among more and less culpable co-defendants, and the prosecutor's charging decisions.[11] Because the factors

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[11] A court must "at a bare minimum" consider the listed factors, may consider the "many and varied" mitigating factors that can "fairly be said to touch upon" the defendant's cooperation, and may consider factors unrelated to cooperation in limiting the extent of a departure. *United States v. Mariano*, 983 F.2d 1150, 1156-57 & n.6 (1st Cir. 1993); *see also United States v. Davis*, 679 F.3d 190, 191, 193, 197 (4th Cir. 2012) (district court properly considered violent nature of offense of conviction, criminal history, and prior reduction under § 5K1.1 in determining reduction under Rule 35(b)); *United States v. Winebarger*, 664 F.3d 388, 395, 397 (3d Cir. 2011) (district court properly considered seriousness of offense); *United States v. Grant*, 636 F.3d 803, 817 (6th Cir. 2011) (listing factors courts may consider in determining extent of reduction under § 3553(e) and § 5K1.1, including proportionality between more and less culpable defendants, criminal history, and seriousness of the crime); *United States v. Chapman*, 532 F.3d 625, 627-29 (7th Cir. 2008) (district court properly considered "defendants' prior criminal histories and the seriousness of their offenses" in sentencing them at high end of their new guideline ranges); *United States v. Casiano*, 113 F.3d 420, 431 (3d Cir. 1997) (district court properly considered "seriousness of the crime" and "impact on the victim"); *United States v. Manella*, 86 F.3d 201, 202 & n.3, 205 (11th Cir. 1996) (court may consider nature,

the district courts may consider are "not limited," nothing prohibits them from considering the applicable guideline range under § 2D1.1 in imposing a sentence upon motion of the government under § 3553(e). Indeed, § 3553(e) requires district courts to impose sentence "in accordance" with that range, and § 5K1.1 expressly authorizes them to depart below that range. As demonstrated below, they frequently do both.

B. District courts routinely impose sentences below or within the applicable guideline range, and otherwise base sentences on that range, in cases like those of petitioners.

To determine whether district courts in fact base sentences on the applicable guideline range when such range is below a mandatory minimum following substantial assistance motions under 18 U.S.C. § 3553(e), amicus surveyed 89 Federal Defender offices across the nation.[12] In all, 88 offices responded.

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circumstances and seriousness of offense, and sentence that would have been imposed absent motion in deciding "to what extent a defendant's sentence should be reduced for substantial assistance"); *United States v. Webster*, 54 F.3d 1, 4 (1st Cir. 1995) (district court may reduce sentence upon motion under § 5K1.1 to offset consecutive mandatory minimum sentence, and properly considered the "seriousness of the defendant's criminal conduct"); *United States v. Alvarez*, 51 F.3d 36, 38-41 (5th Cir. 1995) (district court may base decision to depart only on defendant's substantial assistance, but there is no limitation on what it may consider in determining extent of departure, including relative culpability).

[12] Defenders have offices in 91 of the 94 federal judicial districts. The Northern and Southern Districts of Iowa, headed by the Federal Defender on the merits brief, were not surveyed.

Responses from defenders in seven offices were not counted because either the defenders reported that there were no such cases in their district (five responses), or the practice in the district was indiscernible (two responses). Thus, 81 responses were included.

In the large majority of districts—78% (63 of 81)—judges expressly based sentences in whole or in part on the applicable guideline range. In 69% (56 of 81) districts, the applicable guideline range was the starting point or the ending point for substantial assistance departures. In 23 of those districts, some or all judges used the applicable guideline range as the starting point; in seven districts, some or all judges used the applicable guideline range as the presumptive ending point for a departure from the mandatory minimum; and 26 other districts were mixed, with most judges using the applicable guideline range as the starting point and some judges using it as the presumptive ending point. In another 8.6% (7 of 81) districts, judges used the applicable guideline range in some way to determine the extent of the departure from the mandatory minimum. A few defenders in districts where judges now depart only from the mandatory minimum noted that, before the circuit required otherwise, they departed from the applicable guideline range. In most districts, the government always or nearly always moves under both § 3553(e) and § 5K1.1.

The survey was conducted from January 10 through 25, 2018. Records of the survey are on file with amicus.

Defenders in many offices provided comments demonstrating that, in their districts, once a § 3553(e) motion has been made, the mandatory minimum plays essentially no role in judges' sentencing determinations. The response from one of the defender offices in the First Circuit explained that:

> [T]he practice in any case where the judge could go below the mandatory minimum (safety valve, substantial assistance) is that, once it is legal to breach the mandatory minimum, the judges ignore the mandatory minimum and use the guideline range as if it were any other sentencing.

A defender office in the Fourth Circuit reported a similar practice, illustrated by the example of a former client:

> [The client] pleaded to conspiracy to distribute 50 grams or more of crack, and faced a 120-month mandatory minimum in 2007. The otherwise applicable guidelines were 87-108. The Government filed a substantial assistance motion asking for a 50% reduction, and specifically said that meant it was asking the court "to impose a sentence within a range of 43-54 months." The Court imposed 43 months, 50% off the low end of the guideline range.

Another office in the Fourth Circuit reported that "when the government files a § 3553(e) motion, the

mandatory minimum is now gone, and the parties make arguments based on the otherwise applicable guideline range."

An office in the Eighth Circuit explained:

> Once the court grants the motion, the mandatory minimum is gone. When the government files a § 3553(e) motion only, the court departs to a sentence within the guideline range. But the government nearly always files under both § 5K1.1 and § 3553(e), and the court departs from the guideline range. This has always been our position, the government's position, and Probation's position too.

Other offices in the Eighth Circuit reported that some judges "use 'the key' that unlocks the mandatory minimum and then depart from the guideline range," and that judges in the district "go to the applicable guideline range and then determine the amount of departure without consideration of the mandatory minimum."

Likewise, an office in the Sixth Circuit reported that "the § 3553(e) motion removes the effect of the mandatory minimum, and the starting point becomes the properly calculated guideline range." An office in the Second Circuit reported that "[t]he judge essentially disregards the mandatory minimum altogether, starts at the guidelines range, and then decides whether or not to depart downward from the guidelines range." An office in the Fifth Circuit reported:

> Some judges go directly to the guideline range and ignore the mandatory minimum when there is a § 3553(e) motion. They conduct a sentencing as if there is no mandatory minimum. Cooperation and mitigation are argued by the defense for the court to go below the guideline range, and the mandatory minimum is ignored by the parties.

An office in the Ninth Circuit reported that "as long as the government files a § 3553(e) motion, the judges treat the mandatory minimum as if it never applied and guide their sentencing decision by the relevant guidelines and the government's assessment of the cooperation."

An office in the Tenth Circuit reported that "once the mandatory minimum has been pierced, the focus returns to the original guideline range, then the court applies any substantial assistance departure from there." Another office in the Tenth Circuit reported:

> In our district, the departure was always from the guideline range. Yes, the ordinary guideline range. In fact, I have never seen references to § 5G1.1(b). It is definitely the practice in this district to depart from the ordinary guideline range.

In petitioners' cases, the government moved for reduced sentences under both § 3553(e) and § 5K1.1. Accordingly, the judge was not only empowered to disregard the mandatory minimum and required to

impose sentence in accordance with the guidelines, but was also authorized to depart below the guideline range. Under Eighth Circuit law, however, the district court was required to use the mandatory minimum as the "starting point," and to base the "reduction below the statutory minimum . . . exclusively on assistance-related considerations," apparently excluding the applicable guideline range. *Koons*, 850 F.3d at 977. Even so, the district court not only calculated, but consulted, and in three of the five cases sentenced within, the range determined under § 2D1.1. Pet. Br. at 3-10, 22-24. And in Mr. Gutierrez's case, the judge determined that the applicable guideline range of 188-235 months was "flaw[ed]," and thus varied upward to 300 months, then departed downward from 300 months to 192 months based on substantial assistance, a sentence squarely within the applicable guideline range. *Id.* at 10.

Yet, the Eighth Circuit held that petitioners were not eligible for § 3582(c)(2) sentence reductions because their sentences were not "based on" the subsequently lowered guideline range. *Koons*, 850 F.3d at 974. And the Eighth Circuit is not alone in maintaining that sentences were not "based on" the applicable guideline range in the face of record evidence demonstrating that the district court in fact relied on the guideline range. *See, e.g.*, *United States v. Roa-Medina*, 607 F.3d 255, 259-60 (1st Cir. 2010); *United States v. Carter*, 595 F.3d 575, 578-79 (5th Cir. 2010).

In contrast, the Third and D.C. Circuits, which reject a categorical bar, recognize that the applicable guideline range in fact plays a role. *See Savani*, 733

F.3d at 65 (observing that when the government files a motion under § 3553(e) and § 5K1.1, "courts often depart below both the guideline range and the mandatory minimum"); *In re Sealed Case*, 722 F.3d at 366 (observing that the district court reduced the sentence not only from the mandatory minimum but from the guideline range, and concluding that the record left "no doubt" that the "guideline range was 'a relevant part of the analytic framework'" and that the sentence was therefore "based on" the guideline range).

Given how substantial assistance motions operate in practice, along with the Eighth Circuit's errors in interpreting the relevant statutes and guidelines, its categorical rule that the sentences of defendants like petitioners' can never be "based on" a subsequently lowered guideline range is deeply flawed. The very different outcomes reached by the Third and D.C. Circuits are not only legally correct, they align with the practice in the majority of courts—including the district court in petitioners' cases. As in *Savani* and *In re Sealed Case*, remand is appropriate here, particularly given that the district court calculated, considered, and in some cases sentenced within, the guideline range. Pet Br. at 3-10, 22-24; *see Savani*, 733 F.3d at 67; *In re Sealed Case*, 722 F.3d at 370.

III. The Principles Underlying the Sentencing Reform Act Favor the Petitioners' Eligibility for Sentence Reductions.

A. Congress intended Section 3582(c)(2) to promote fairness and reduce arbitrary outcomes.

The retroactivity mechanism in § 3582(c)(2) is a component part of the Sentencing Reform Act of 1984 ("SRA").[13] The SRA was "aimed at strengthening the consistency, rationality, and effectiveness of federal sentencing," H.R. Rep. No. 103-460 (1994), and at "provid[ing] certainty and fairness" in sentencing while "avoiding unwarranted sentencing disparities," and "maintaining sufficient flexibility" for judicial discretion in individual cases, 28 U.S.C. § 991(b)(1)(B).

To effectuate these purposes, Congress directed the Sentencing Commission not only to promulgate, but to "periodically . . . review and revise" the Sentencing Guidelines. 28 U.S.C. § 994(o). The Commission was to continually "measure the degree to which sentencing . . . practices are effective in meeting the purposes of sentencing," § 991(b)(2), and to ensure that the guidelines reflect "advancement in knowledge of human behavior as it relates to the criminal justice process," § 991(b)(1)(C).

Congress recognized that an inevitable corollary of continual review would be that guidelines applied in already final sentences might later be judged inaccurate, unjust, or out of step with the community's views. Congress intended § 3582(c)(2)'s retroactivity

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[13] Pub. L. 98–473, Title II, ch. II, 98 Stat. 1987, 1987-2040.

provision to blunt the worst of this. *See* S. Rep. No. 98-225, at 121, 180 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182; *see also Freeman*, 564 U.S. at 534 (plurality opinion) ("Congress enacted § 3582(c)(2) to remedy systemic injustice.").

B. The retroactive application of an amendment demonstrates a reasoned judgment that the change is significant enough to compel reconsideration of existing sentences.

The Commission wields its retroactivity power carefully and does not exercise it except under compelling circumstances. In evaluating retroactivity, it considers the purpose of the amendment, the magnitude of the change in the guideline range, and the difficulty of applying the amendment retroactively. U.S.S.G. § 1B1.10, comment. (backg'd.). Over its history, the Commission has selected only thirty amendments, of the more than 800 promulgated, for retroactive application. *See* U.S.S.G. § 1B1.10(d) (listing retroactive amendments). Some retroactive amendments were relatively modest adjustments, but several reflect the Commission's determination to prevent major injustice, to settle significant legal questions, and/or to correct fundamental problems in the Guidelines' structure.

Perhaps the most prominent retroactive amendments have concerned the drug weight table, U.S.S.G. § 2D1.1(c). In 2008 and 2011, the Sentencing Commission made retroactive amendments to the base offense levels for crack cocaine to ameliorate "urgent and compelling" doubts about the 100:1 crack-to-powder ratio. U.S.S.G. app. C, amend. 713 (2008)

(reason for amendment) (approving the retroactive application of Amendment 706); *cf. Kimbrough v. United States*, 552 U.S. 85, 98-99 (2007) (citing U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 8 (2007)). Similarly, in 2014, the Commission retroactively reduced the base offense levels for *all* drugs because "[experience] indicate[s] that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities." U.S.S.G. app. C, amend. 782 (2014) (reason for amendment); *see also* Hon. Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1, 17 (2015) (Amendment 782's "modest[]" reductions reflected Commission's view that "immediate steps were necessary" to address growing concern over unproductively harsh drug sentences, where needed legislative reform "may take time" and thus come too late).

C. Section 3553(e) and Section 3582(c)(2) are not inconsistent and should operate in a complementary fashion.

Section 3582(c)(2) is an exception to the rule of finality, unrelated to the sentencing provisions under which leniency is earned for substantial assistance, and fairly applied to those who cooperated and obtained § 3553(e) relief from a mandatory minimum.

The legislative backdrop here evinces two distinct purposes: to encourage cooperation by rewarding substantial assistance with leniency at sentencing and to assure that sentencing policy is implemented fairly over time. These purposes are effected through

separate provisions: § 3553(e), which grants judges greater flexibility and discretion in sentencing cooperators; and § 3582(c)(2), which provides judges the authority to reconsider even final sentences in light of retroactive amendments to the Sentencing Guidelines. No statute, guideline, or policy rationale requires that those who receive the benefit of § 3553(e) should not also receive § 3582(c)(2) consideration. The Commission recognized this in U.S.S.G. § 1B1.10(b)(2)(B) (authorizing reductions in sentence for cooperators). *Cf. United States v. Williams*, 103 F.3d 57, 58 (8th Cir. 1996) (permitting § 3553(e) motion in § 3582(c)(2) proceeding "[i]n order that a defendant may receive the full benefit of both a change in the sentencing range *and* the assistance the defendant has previously rendered").

With § 3582(c)(2), Congress created a mechanism for system-wide reconsideration, and discretionary correction, of the final sentences of defendants whose terms of imprisonment were based on a since-discredited guideline. Between 2008 and 2016, 53,645 defendants were resentenced pursuant to § 3582(c)(2).[14] The retroactive application of Amendment 706 (the crack amendment) alone prompted the resentencing of nearly 8,000 defendants, reducing their sentences by an average of two and a half years.[15] The impact of Amendment 782—the

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[14] U.S. Sentencing Comm'n, Interactive Sourcebook of Federal Sentencing Statistics, Table 62, https://isb.ussc.gov/Login (last visited Jan. 25, 2018).

[15] As of December 2014, 7,748 defendants had been resentenced, with an average reduction of 30 months (representing a 19.9% decrease). U.S. Sentencing Comm'n, *Final Crack Retroactivity Data Report Fair Sentencing Act*, Table 1,

retroactive amendment at issue in this case—has been even more profound: over 30,000 resentencings, with an average reduction of just over two years' imprisonment.[16] During that period, however, many others were denied reductions by operation of rules like the Eighth Circuit's.[17]

D. The Eighth Circuit's rule creates unwarranted disparity and unjust results, in contravention of the goals of the Sentencing Reform Act.

In addition to its legal flaws, the Eighth Circuit's rule operates in an arbitrary and punitive way vis-à-vis cooperating defendants. Under the Eighth Circuit's rule, defendants with less serious offenses and less serious criminal histories will remain incarcerated longer than defendants with more serious offenses and criminal histories. This is because

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Table 8 (2014), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf (average reduction analysis excluded 830 defendants given time-served sentences).

[16] As of September 30, 2017, 30,116 defendants have had their sentences reduced under Amendment 782, with an average reduction of 25 months (representing a 17.2% decrease). U.S. Sentencing Comm'n, *2014 Drug Guidelines Amendment Retroactivity Data Report*, Table 7 (2017) available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20171101-Drug-Retro-Analysis.pdf (average reduction analysis excluded 735 defendants given time-served sentences).

[17] As of September 30, 2017, 2,952 defendants were denied re› ›f for the reason that the "statutory mandatory minimum controls sentence." *Id.*, Table 8. Some fraction of those were defendants like petitioners.

defendants whose original guideline ranges exceeded the mandatory minimum in whole or in part may receive a departure under § 3553(e) and a retroactive reduction, while those whose original guideline range fell below the mandatory minimum are denied retroactive relief, under the theory that their sentences were based solely on the mandatory minimum.

The guideline range typically exceeds the mandatory minimum when the defendant has greater criminal history, or receives an aggravating role adjustment, or receives a guideline increase for any of the many aggravating factors listed in § 2D1.1(b), including possession of a weapon, or the use, threat or direction of violence. The guideline range typically is less than the mandatory minimum when the guideline range was reduced because the defendant's role in the offense was minor or minimal, and/or because the defendant accepted responsibility. The examples below illustrate the problem.[18]

In the first example, Aaron is the more serious offender, having been convicted of a crime involving 150 grams of crack cocaine, compared to Barry's 50 grams. Despite identical original sentences, only Aaron, the more serious offender, is eligible for § 3582(c)(2) relief under the Eighth Circuit's rule, simply because his applicable guideline range exceeded the mandatory minimum, whereas Barry's did not:

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[18] These examples are not to minimize petitioners' offenses or their criminal histories; rather, they demonstrate the logical and equitable flaws in the Eighth Circuit's approach.

	AARON	BARRY
Drug Amount	**[illegible] crack cocaine**	**[illegible] crack cocaine**
Mandatory Minimum	120 months	120 months
Offense Level[19]	**32**	**30**
Criminal History Category	I	I
Guideline Range	**121-151 months**	**97-121 months**
§ 3553(e) Motion?	Granted	Granted
Original Sentence	**[illegible] months**	**[illegible] months**
Eligible for § 3582 under 8th Circuit's view?	**Yes**	**No**

The same result obtains from applying the Eighth Circuit's approach to defendants with differing criminal histories—the defendant with the more serious criminal history, Clay, receives a reduction under the retroactive amendment, whereas the one with the less serious criminal history, Dale, does not:

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[19] We have used here the 2006 version of the Federal Sentencing Guidelines Manual, *available at* https://www.ussc.gov/guidelines/archive/2006-federal-sentencing-guidelines-manual.

	CLAY	DALE
[illegible]	[illegible] crack cocaine	[illegible] crack cocaine
Mandatory Minimum	120 months	120 months
[illegible][20]	29	29
Criminal History Category	IV	I
[illegible]	121-151 months	87-108 months
§ 3553(e) Motion?	Granted	Granted
[illegible]	[illegible] months	[illegible] months
Eligible for § 3582 under 8th Circuit's view?	**Yes**	**No**

The Eighth Circuit's rule leaves these outcomes unexplained. Worse, the data show that the outcomes are not consonant with the goals of the Sentencing Reform Act. The second example—highlighting criminal history—is a stark demonstration of this. Sentencing Commission studies show that Dale (with

[20] We have used here the 2006 version of the Federal Sentencing Guidelines Manual, *available at* https://www.ussc.gov/guidelines/archive/2006-federal-sentencing-guidelines-manual.

his less serious criminal history) is less likely to be a repeat offender or to pose a danger to his community than Clay. *See* U.S.S.G. § 4A1.3, comment. (n.3); *see also* U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, a Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate* (2004). Yet, under the Eighth Circuit's approach, Dale will remain incarcerated longer than Clay, because Clay is—inexplicably—eligible for a further reduction in his sentence under § 3582(c)(2), but Dale is not.

Moreover, under the Eighth Circuit's approach, defendants who went to trial or pled guilty and did not cooperate will receive reductions under a retroactive amendment, while those who cooperated with the government—often putting themselves and their families at risk[21]—frequently will be entitled to *no*

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[21] A 2014 study commissioned by the Administrative Office of the U.S. Courts showed the risk to cooperators to be real and widespread. District judges reported 571 instances of physical or economic harms or threats to cooperators between 2012 and 2015, including reports of 31 murders. Margaret S. Williams et al., Fed. Judicial Ctr., *Survey of Harm to Cooperators: Final Report*, at 8, 10, 63-64 (2016), *available at* https://www.fjc.gov/sites/default/files/2016/Survey%20of%20Harm%20to%20Cooperators%20-%20Final%20Report.pdf. Due to these risks, the Bureau of Prisons frequently places cooperators in administrative segregation for their own protection. *United States v. McCraney*, 99 F. Supp. 3d 651, 655 (E.D. Tex. 2015). In segregation, a cooperator "has no access to classes or general outdoor recreation and is not eligible to receive the 'good time credit' that can be earned by inmates on the yard. Thus, any 'protection' that the [disciplinary segregation unit] provides comes with severe drawbacks." *Id.*

benefit from the amended guideline.[22]

The government controls all of this. Prosecutors have sole authority over charging decisions, including the drug amount charged in the indictment and whether to increase the mandatory minimum from 5 to 10 years, or from 10 years to 20 years, or to mandatory life, by filing a notice of enhancement for one or more prior convictions for a "felony drug offense." *See* 21 U.S.C. § 851. These prosecutorial decisions directly influence a defendant's decision to plead, cooperate, or go to trial.

There has long been discomfort with this power of prosecutors to charge—or not charge—an offense carrying a mandatory minimum, or to seek—or not seek—a recidivist enhancement. *See, e.g.*, David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. Law & Econ. 591, 622 (Oct. 2005) ("[P]rosecutors generally have the discretion to prosecute a defendant for a lesser charge than the initial arrest charge, and the use of such discretion can have dramatic effects on sentencing with respect to mandatory sentencing laws.").[23] The government's use

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[22] In addition to being nonsensical, these results run contrary to Congress's and the Commission's goal of avoiding unwarranted disparity in sentencing. *See* 28 U.S.C. § 991(b)(1)(B); *cf. Freeman*, 564 U.S. at 533 (plurality opinion) (noting the irrationality of a rule that "would permit the very disparities the Sentencing Reform Act seeks to eliminate").

[23] *See also* Angela Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power. . . . In federal and state jurisdictions governed by sentencing guidelines, these decisions

of § 851 enhancements, in particular, has been proven to create racial and geographic disparity. *See United States v. Young*, 960 F. Supp. 2d 881, 885-902 (N.D. Iowa 2013) (discussing Sentencing Commission data); *cf. United States v. LaBonte*, 520 U.S. 751, 779-80 (1997) (Breyer, J., dissenting) (comparing guidelines and mandatory minimum sentencing). The Eighth Circuit's rule compounds the unfairness of these unreviewable and often invisible decisions.

"There is no good reason to extend the benefit of the Commission's judgment [to retroactively reduce the drug guidelines] only to an arbitrary subset of defendants" because their applicable guideline ranges were above an applicable mandatory minimum, and to deprive another subset of defendants of that benefit because their guideline ranges were below it. *Freeman*, 564 U.S. at 533 (plurality opinion). "Congress enacted § 3582(c)(2) to remedy systemic injustice, and the approach" of the Eighth Circuit "would undercut a systemic solution." *Id.* at 534. The Eighth Circuit's rule and the illogical outcomes that flow from it cannot be squared with Congress's goals in § 3582(c)(2) of promoting fairness in sentencing by allowing for the retroactive correction of injustices, and in § 3553(e) of encouraging cooperation through leniency. Courts have an "obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government." 2A Sutherland, Statutes and Statutory

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often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence.").

Construction § 45.05 (4th ed. 1984). The Eighth Circuit's rule fails this test.

CONCLUSION

The Eighth Circuit's rule is incorrect, illogical, and unfair. Section 3553(e) and the Sentencing Guidelines authorize courts imposing sentences in substantial assistance cases to rely upon the applicable U.S.S.G. § 2D1.1 guideline range, which has subsequently been lowered by the Sentencing Commission. Like other defendants sentenced based on the applicable § 2D1.1 guideline range, whether in whole or in part, petitioners are eligible for reductions in sentence under the retroactive amendment. Any other result would be contrary to the canons of statutory construction, to federal criminal practice, and to basic principles of justice. For these reasons, amicus National Association of Federal Defenders urges the Court to rule in favor of the petitioners.

Respectfully submitted,

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